74-1239

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. [redacted]

MITCHELL BROS. TRUCK LINES, AN OREGON CORPORATION,

Petitioner,

v.

ELDON GILSTRAP, WARREN P. BLAND, ROGER GILMORE, CLAUDIO MARTINEZ, RAYMOND MORRIS and C.P. ZACHOW,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF OREGON

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March 26, 1975

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IN THE

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MITCHELL BROS. TRUCK LINES, an Oregon corporation,

Petitioner,

v.

ELDON GILSTRAP, WARREN P. BLAND, ROGER GILMORE, CLAUDIO MARTINEZ, RAYMOND MORRIS and C.P. ZACHOW,

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PETITION FOR WRIT OF CERTIORARI
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OF THE UNITED STATES

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Mitchell Bros. Truck Lines, (defendant-appellant below) respectfully prays a writ of certiorari be issued to review the judgment of the Supreme Court of the State of Oregon in the above-entitled cause entered December 12, 1974, and order denying Mitchell's petition

for rehearing entered January 3, 1975, affirming the trial court's judgment for money damages awarded to respondents (plaintiffs below) for petitioner's alleged breach of certain provisions of the collective bargaining agreement binding upon the parties.

OPINION BELOW

The opinion of the Supreme Court of the State of Oregon is reported at 99 OAS 2909, ____ Or. ____, 529 P2d 370 (1975) and is appended at pages 1a to 36a (Appendix A).

JURISDICTION

The Judgment of the Oregon Supreme Court was entered December 12, 1974, Appendix A p 1a, and a petition for rehearing was denied by the Oregon Supreme Court on January 3, 1975. This petition for the issuance of a writ of certiorari is being filed within ninety (90) days

after the aforesaid denial of the petition for rehearing on January 3, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

Four questions are presented in this Petition. In affirming the trial court's decision for damages resulting from an alleged breach of collective bargaining agreement:

(1) Did the Oregon Supreme Court erroneously deprive petitioner (the employer-party to a collective bargaining agreement) of its right to compel respondents (employee-parties) to comply with contractual mandatory grievance procedures?

(2) By finding that the union breached its duty to fairly represent its members in their grievances without such allegations plead and proved by respondents, or any such trial court

finding, did the Oregon Supreme Court err in failing to follow this Court's holding in Vaca v. Sipes that mandatory grievance procedures in a collective bargaining agreement can only be avoided if there is substantial evidence that the union acted dishonestly, deceitfully or discriminatorily in refusing to handle its members' grievances?

(3) Did the Oregon Supreme Court err in extending the liberal First and Ninth Circuits' application of the Glover (Glover v. St. Louis-S.F. Railroad Company, 393 U.S. 324) "futility exception" to this Court's rule that mandatory grievance procedures must be followed, rather than following the limitations to the futility exception imposed in holdings of the Fourth and Seventh Circuits?

(4) Did the Oregon Supreme Court err in failing to follow this Court's strong

policy in favor of requiring parties to attempt to utilize mandatory grievance procedures prior to initiating private litigation as recently reaffirmed by this Court in Emporium Capwell Co. v. Western Addition Community Organization, Case No. 73-696, ____ U.S. ____, ____ S.Ct. ____ (Feb., 1975)?

STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947 (29 USC §185(a)):

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

Petitioner is a truck line operating in interstate commerce. For a number of years it has entered into lease agreements

with owner/operators of trucks (including the six respondents), whereby the trucks were leased to the petitioner; and the owner/operators, including respondents, were employed as drivers. Petitioner, as a member of the Oregon Draymen's Association, and respondents, as members of the Teamsters Union, were subject to a collective bargaining agreement entered into by the Union and the Association. Article XXXI of that agreement specifically covers the parties' relationship. Pertinent sections of Article XXXI are digested by the Oregon Supreme Court at page 4a, Appendix A. Section 18 of that Article imposes a duty on all parties to submit any disputes arising from the agreement to mandatory grievance procedures.

The matter below proceeded for decision as actions at law. Each of the respondents sought recovery for damages

of breach of contract. Respondents alleged that: (1) petitioner breached certain provisions of the parties' lease by not abiding by alleged oral promises to provide for additional compensation; and (2) petitioner breached certain provisions of the collective bargaining agreement (specifically Article XXXI, Section 10) by deducting certain Federal Fuel and Highway Use Taxes from the respondents' settlement checks over a six-year period (the applicable Oregon Statute of Limitations on breach of contract actions).

Petitioner alleged as an affirmative defense in accordance with Federal law that since the respondents failed to exhaust the mandatory grievance procedures provided for in the collective bargaining agreement, the trial court was without jurisdiction to hear the collective bargaining issues in this case. Petitioner has continued to raise this issue th-ough

appeal and petition for rehearing to the Oregon Supreme Court.

There is conflicting testimony relied upon by the Oregon Supreme Court that respondent Gilstrap discussed all of the problems raised in the litigation with Union representatives prior to his instituting the litigation. Gilstrap contended that he was told the Union had no jurisdiction to help him because it did not participate in negotiating all terms of the equipment leases. Further, after the action against Mitchell Bros. was instituted, the attorney for the local union stated that: "by entering into lease agreements with plaintiff (petitioner), your clients (the individual respondents) embarked on an independent course of action, separate and distinct from the Union Contract." (pp. 25a App. A) On this evidence the Oregon Supreme Court

held that it was futile for all respondents to file grievances and the Union breached its duty to fairly represent all respondents.

Nevertheless, some six months after filing their initial complaint two of the respondents first formally filed grievances, after receiving notice of this defense raised by the petitioner. These grievances were discussed in two meetings with the Union officials. There is no evidence that these two respondents presented their leases and requested the Union officials to analyze their claims by comparing the leases with the alleged conflicting collective bargaining contract provisions.

At these meetings Union officials explained to the two respondents that under the local's policy, when an employee-member decides to use means other than the grievance procedure to seek remedies under the collective bargaining agreement, the

local is reluctant to press his grievances. The local desires its members to elect either the union's representation or private counsel's representation because, if the parties insist on private counsel, it puts the union in a very untenable position since the members are now proceeding outside the grievance procedures within the framework that the union assists. (R 21, 55). If the members desire to continue to seek private redress, the local officials make sure that the member cuts the local union loose from any further responsibility to process grievances. (R. 60-62). (Note that this position was recognized as being reasonable by the trial court though not by the Oregon Supreme Court. The trial court specifically concluded that if identical issues were pressed through grievances and at the same time decided by the trial court, two inconsistent decisions would result and neither

party would know which decision to follow. (R 196-7))

At the conclusion of the discussions, local union officials requested the two respondents who filed to elect to proceed either with their collective bargaining claims through grievances and drop that part of their suit involving the breach of the collective bargaining agreement or continue with the litigation of all issues in their court actions. One of the respondents withdrew his grievances after this discussion, and the evidence is in conflict as to whether the other respondent withdrew his grievances during the course of this litigation.

This is not a proceeding brought under Title 28 U.S.C. §1337, as at no time during these proceedings have any of the respondents alleged that the Union's actions in regard to its representation of their interests were arbitrary or

exercised in bad faith. In fact, the principal respondent testified that his filing of grievances to exhaust his collective bargaining agreement remedies was done as a mere formality because petitioner had raised this issue as an affirmative defense in this proceeding, and that "to sue the Union was not realistic for the simple reason the Union had done nothing wrong". (R 156,157).

Another driver/lessor, Lloyd Logan, during the course of litigation decided (rather than to first resort to the trial court to press his identical claim for recovery of the disputed Federal taxes he had paid) to process his claim through the appropriate grievance procedures, which were actively pressed by the Union. Logan's grievances went to arbitration for decision, and this arbitration resulted in a decision contrary to the Court's decision. The arbitrator limited Logan's damages

to 90 days as provided in the collective bargaining agreement (Ex. 1 Petition for Rehearing) Article VIII, Sections 1&3, pp. 33a &34a App. A). Presently the parties below are faced with two conflicting decisions on this issue on collective bargaining claims now pressed by other Teamster members against petitioner.

When the matter proceeded to trial, the trial court held that the respondents could either proceed to grievances or to trial on the merits of their contention that the petitioner breached the applicable collective bargaining provisions. After respondents again elected to proceed with their actions, a trial on the merits was held of all issues.

The trial court then held that petitioner breached the collective bargaining provisions by deducting federal fuel taxes and federal highway use taxes from

respondents' settlement checks but held in favor of the petitioner on the respondents' alleged oral promise lease claims. Relying on the simultaneous decision of the arbitrator in the Logan grievance procedure, petitioner sought rehearing of the trial court's decision upon the basis that any damages awarded to the respondents must be limited by the collective bargaining agreement (Article VIII, Section 3) to 90 days from the filing of their claims. The trial court denied this petition because Article VIII, Section 3 of the grievance procedures was not made a part of the equipment leases, and therefore the respondents were not limited to claims made within the 90-day period after written demand. This decision was appealed to the Oregon Supreme Court.

The Oregon Supreme Court affirmed this decision. The Oregon Supreme Court's

decision was not based, however, upon findings made by the trial court, but rather on the theory that the respondents were excused from exhausting mandatory grievance procedures because the Union failed to meet its duty to fairly represent the respondents in their dispute with petitioner and, secondly, that any recourse to the grievance procedures would be wholly futile. Petitioner's rehearing on these issues was denied.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE OREGON SUPREME COURT TO EXCUSE THE RESPONDENTS FROM UTILIZING MANDATORY GRIEVANCE PROCEDURES IS IN CONFLICT WITH THE LABOR MANAGEMENT RELATIONS ACT AND THE SUPPORTING BODY OF FEDERAL LAW

The Oregon Supreme Court has now emasculated this Court's holdings in Maddox, Supra, and Congress's intent in passing the Labor Management Relations Act. See Motor Coach Employees v. Lock-

ridge, Supra, 403 U.S. at pp. 286 at 301. While giving lip service to the applicable federal labor policy, the Court wrongfully excused the respondents from attempting to utilize mandatory grievance procedures under the facts of this case prior to their institution of suit and determination by the Oregon Court of the merits of their respective claims that the petitioner breached the collective bargaining agreement. The effect of this decision means that the Oregon Court now holds that at least in Oregon there are no enforceable mandatory grievance procedures in collective bargaining agreements. Contrary to Federal labor policy, this clearly frustrates the intent of the Union and petitioner to resolve the members' and the petitioner's differences peacefully through the grievance machinery. This decision now permits parties to labor

agreements to ignore mandatory grievance procedures and flood federal and state courts with labor claims of all nature.

II

THE DECISION OF THE OREGON SUPREME COURT IS ERRONEOUS BECAUSE THERE IS NO SUBSTANTIAL EVIDENCE THAT THE LABOR UNION BREACHED ITS DUTY TO FAIRLY REPRESENT THE RESPONDENTS AND ACTED IN AN ARBITRARY MANNER OR IN BAD FAITH

As held by this Court in Republic Steel v. Maddox, Supra, 379 U.S. at p. 652, federal labor policy requires individual employees wishing to assert collective bargaining contract claims to attempt to use the contract grievance procedures agreed upon by the employer and union as a mode of redress prior to instituting court action. This was not done in this proceeding. Concededly, this Court has recognized in Vaca v. Sipes, 386 U.S. 177 at 185, that there is an exception to this policy when the Union breaches its duty to fairly represent its

members. This Court, however, had held that there must be alleged and proven arbitrary or bad faith conduct on the part of the Union and this must be established by substantial evidence of fraud, deceitful action or dishonest conduct. (Vaca v. Sipes, at p. 193; Humphrey v. Moore, 375 U.S. at p. 348;Motor Coach Employees v. Lockridge, 403 U.S. at p. 299).

Further, where there are no such allegations made or proven against the union either by neglecting to sue the union or failing to allege the union's bad faith conduct at any point in the proceeding below, the above requisite elements have not been satisfied.(Motor Coach Employees v. Lockridge, Supra, at p. 299-300). Hence, the grievance procedures are the only mode of relief for these respondents.

Here the only evidence of the union's

"arbitrary conduct" is its reluctance to actively prosecute the grievances of those two respondents who initially filed suit against petitioner as long as the respondents continued to press their litigation. The Union actively prosecuted the grievances of another Teamster member who did not first file suit for the identical claims made by respondents against the petitioner. The Union's contentions that the respondents should elect to proceed to court or drop their actions and rely on the Union for relief from petitioner's alleged breach of collective bargaining agreement is not arbitrary conduct; and neither was the Union's reluctance to represent the respondents on their claims that the petitioner breached those provisions of the leases which were not negotiated by the Union nor a part of the union contract. The Union's reluctance (when respondents

elected on their own volition to seek private redress on the collective bargaining issues prior to coming to the Union) to concurrently proceed with grievances when an inconsistent decision would result was in no respect wrongful. The Union's concern that inconsistent decisions would leave the parties unable to determine which to follow is reasonable and was not, and is not, based upon arbitrary, hostile or discriminatory conduct.

In each federal circuit court case cited by the Oregon Supreme Court as being the federal law on the issue of fair representation, unions were named parties and allegations were made in the proceedings that the union breached its duty of fair representation. In fact, the court in Beriault v. Local 40, 501 F2d 258 (9th Cir. 1974) (the basis for the Oregon Court's decision below), specifically dismissed the contract breach claim made by

those plaintiffs since those plaintiffs sued first, then went to grievances, and ultimately declined to proceed further after the first step of the proceeding. The factual background in Beriault is practically indistinguishable from the facts here.

III

UNDER THE FACTS HERE, THE OREGON SUPREME COURT MISAPPLIED THE SO-CALLED "FUTILITY" EXCEPTION TO THE COURT'S REQUIREMENT THAT UNION MEMBERS MUST ATTEMPT TO UTILIZE MANDATORY GRIEVANCE PROCEDURES PRIOR TO INSTITUTING LITIGATION AGAINST THEIR EMPLOYERS FOR BREACH OF COLLECTIVE BARGAINING AGREEMENTS

The Oregon Supreme Court misapplied the standards of Vaca v. Sipes, Supra, as extended in Glover v. St. Louis-S.F. Railroad Company (393 U.S. 324), in making its own findings that it would have been futile for the respondents here to proceed with grievance procedures. Glover is factually distinguishable. Here there is no allegation made that the Union breached

its duty of fair representation or it would be futile for the respondents to attempt to utilize the grievance procedures. This Court in Czosek v. O'Meara, 397 U.S. 25 at 97, citing Glover, indicated that the employer there would be subject to suit only if the employee alleged that the breach of agreement was a consequence of the union's discriminatory conduct or the employer in any way was implicated in the Union's action. Further, here there is no contention alleged by respondents that the union officials were guilty of any discrimination because of race, religion or any other grounds. The record indicates that the Union requested that the respondents elect to proceed privately or through grievances. There is no evidence of any personal animosity held by local union officials against any of the respondents.

IV

THE OREGON SUPREME COURT'S EXTENSION OF THE "FUTILITY" EXCEPTION IS IN DIRECT CONFLICT WITH DECISIONS OF THE FOURTH AND SEVENTH CIRCUIT COURT OF APPEALS AND EXTENDS FURTHER THAN THE MORE LIBERAL EXTENSIONS OF THE FIRST AND NINTH CIRCUITS

As the Oregon Court conceded, there is a clear conflict between the circuits in extending the so-called futility doctrine of Glover. The Fourth and Seventh Circuits have limited the application of the futility doctrine only when there has been collusion between the union and the employer, which is not the case here. Orphan v. Fernco Construction Corporation, 462 F2d 794, (7th Cir. 1972); Lusk v. Eastern Products Corporation, 427 F2d 705 (4th Cir. 1970). Other courts have limited it to only cases of race discrimination. Fulsom v. United Buckingham Freightline, Inc., 324 F. Supp. 135,137, Note 1.

The Ninth Circuit and possibly the First Circuit may have treated the doctrine

more liberally, as indicated by the Oregon Supreme Court, upon the basis that a union member may be excused from failing to exhaust union remedies because it was reasonable to believe further efforts to invoke these remedies would be futile after repeated solicitations of the union's assistance. (See Arroya v. Sindicato de Trabajadores, et al, 425 F2d 281,283 (1st Cir. 1970); Retana v. Apartment, Motel, Hotel and El. Operators Union, Local No. 14, 453 F2d 1018 (9th Cir. 1972). Even if the Ninth and First Circuits have stated that this is now the federal law, here there is no evidence of such conduct.

Even these latter cases relied upon by the Oregon Supreme Court are not applicable here, however, as they were cases brought against union locals and each plaintiff made specific allegations of union bad faith and/or claimed it was

futile to process their grievance procedures. This is not the case in this proceeding. Clearly this Court should assume jurisdiction to resolve this conflict by making a definitive ruling as to whether the Union conduct in handling the two respondents' grievances here is truly prohibited arbitrary, hostile or discriminatory conduct; and the futility exception of Glover should be limited in the manner as ruled in the Fourth and Seventh Circuits.

It also is imperative that this Court consider the effect of the decision below in light of its recent decision of Emporium Capwell Co. v. Western Addition Community Organization, ____ U.S. ____, ____ S.Ct. ____ (1975). This decision is important to this proceeding because the Emporium Capwell Co. opinion reaffirmed the basic requirement of compliance with mandatory

grievance procedures in a situation involving racial discrimination and because this case was not concerned with arbitrary or bad faith conduct by union officials.

The Oregon Supreme Court did not have the benefit of the Emporium Capwell Co. decision while rendering its judgment against the petitioner in this proceeding. While there may be some dissimilar facts in this proceeding and the Emporium Capwell Co. case, the basic principles involved are identical: mandatory grievance procedures must be followed in order to protect the interests of all union members and maintain the strength of the collective bargaining process. Petitioner submits that this petition for writ of certiorari should be granted to insure compliance with the basic principles of the collective bargaining process.

CONCLUSION

There are numerous identical claims made by these respondents and other teamster members against petitioner for additional breaches of the parties' collective bargaining agreement in the state court awaiting a final decision on the crucial issues raised in this Petition. These claimants, including respondents, have never attempted to use the grievance procedures. The monetary issues involved in this and all proceedings below are substantial; and if the Oregon Supreme Court's decision is fully adopted, petitioner will now experience substantial monetary losses. These losses exceed revenues generated for the transportation services provided by the claimants, and the petitioner will be forced out of business if the Oregon Supreme Court's decision is fully adopted. Due to the distorted interpretation by

the Oregon Supreme Court of the money dispute limitation clause in the collective bargaining agreement (contrary to the arbitrator's decision in the Logan grievance procedure), the petitioner is now faced with a six-year measure of damages rather than 90 days as provided in the bargaining agreement.

The Supreme Court of the State of Oregon misapplied federal law and federal labor policy in permitting the trial court to assume jurisdiction and excuse the respondents from attempting to exhaust the mandatory grievance procedures prior to their litigating their claims that the collective bargaining agreement provisions were breached. The effect of this decision now has eliminated the mandatory grievance procedures in the collective bargaining agreement and it is vital to petitioner that its petition for a writ of certiorari

should be granted.

Respectfully submitted,

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March 26, 1975

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF OREGON

Eldon Gilstrap, Warren P. Bland, Roger Gilmore, Claudio Martinez, Raymond Morris, and C. P. Zachow,

Respondents-
Cross-Appellants

v.

Mitchell Bros. Truck Lines, an Oregon corporation,

Appellant-
Cross-Respondent.

* * * * * *

Appeal from Circuit Court, Multnomah County.

Clifford B. Olsen, Judge.

Argued and submitted September 6, 1974.

Alex L. Parks, Portland, argued the cause for appellant and cross-respondent. With him on the briefs were Russell M. Allen, and White, Sutherland, Parks & Heath, Portland.

Roger G. Tilbury, Portland, argued the cause for respondents and cross-appellants. With him on the brief was Howard Hilson of Ransom, Hilson & Eder, Portland.

Before O'Connell, Chief Justice, and Mc Allister, Holman, Tongue, Howell, Bryson, and Sloper, Justices.

HOWELL, J.

Affirmed.

HOWELL, J.

This is an action at law in which plaintiffs, owner-operators of commercial trucks, seek money damages for breach of certain lease agreements with defendant Mitchell Bros. Truck Lines. Specifically, plaintiffs seek to recover federal highway use taxes and federal fuel taxes which were incurred in the operation of their trucks. They also seek to recover safety bonuses and permit load bonuses which they allege defendant orally agreed to pay. The case was tried before the court and a judgment entered for the plaintiffs on the highway use and fuel taxes and for the defendant on the safety and permit load bonuses. Defendant appeals and plaintiffs cross appeal.

Defendant is a truck line operating in interstate commerce. For a number of years it has entered into lease agreements with owner-operators of trucks whereby the truck

was leased to Mitchell Bros. and the owner-operator was employed as a driver. The owner-operator was to receive two checks: one for truck rental and one for payroll.

The legal relationship between the defendant and the plaintiffs is complex. Under the standardized lease agreements prepared by the defendant, defendant agreed to lease plaintiffs' trucks at a certain rate per mile and to place plaintiffs on its payroll as drivers. The lease also contained the following provision:

> "4. Lessee agrees to assume full responsibility for the equipment leased while the same is in Lessee's possession, said responsibility to include * * * highway use taxes, mileage fees; tolls and State regulatory permits." (Emphasis added.)

Defendant, a member of the Oregon Draymens Association, and plaintiffs, members of the Teamsters Union, are also subject to a collective bargaining agreement entered into by the union and the as-

sociation. Article XXXI of that agreement specifically covers owner-operators. Section 10 of that article provides:

> "Expenses to Be Paid by Employer.
>
> "The Employer or certificated or permitted carrier hereby agrees to pay road or mile tax, social security tax, compensation insurance, public liability and property damage insurance, bridge toll, fees for certificates, permits and travel orders, fines and penalties for inadequate certificates, license fees, weight tax and wheel tax, and for loss of driving time due to waiting at State lines, and also cargo insurance. It is expressly understood that the owner-driver shall pay the license fees in the State in which title is registered.
>
> "All tolls, no matter how computed, must be paid by the Employer regardless of any agreement to the contrary.
>
> "All taxes or additional charges imposed by law relating to actual truck operation and use of highways, no matter how computed or named, shall be paid by the carrier, excepting only vehicle licensing as such, in the State where title is registered." (Emphasis added.)

Plaintiffs also contend that, at a meeting on July 12, 1969, defendant orally agreed to pay plaintiffs three-fourths of

a cent per mile safety bonus annually and three and one-third cents per mile for permit load hauling.[1] Defendant asserts that the plaintiffs failed to come within the required conditions to receive the safety bonus and that no agreement with regard to the permit load bonus was reached.

In summary, plaintiffs are asserting rights based on the lease, the collective bargaining agreement, and oral promises allegedly made at the July 12 meeting.

Prior to reaching the merits of plaintiffs' claims, we are presented with a jurisdictional question raised by defend-

---

1. The safety bonus consisted of a bonus of three-fourths of a cent per mile driven by a driver in a one-year period, provided the driver did not have claims charged to him that aggregated more than $250 in the period. A permit load bonus consists of a bonus paid when the driver's load is too long, wide or high for normal travel, and a special state permit is required. This permit usually restricts the driver to daylight travel and to travel at a lower speed.

ant's plea in abatement.[2] All parties to this dispute were subject to the collective bargaining agreement, including the mandatory grievance procedures therein. Defendant contends that the plaintiffs as owner-operators were required, under the terms of the agreement, to submit any and all disputes or controversies arising out of the agreement to those mandatory grievance procedures.[3]

---

2. The jurisdictional question was actually raised in defendant's answer as an affirmative defense. The court held that the affirmative defense actually constituted a plea in abatement. With the consent of all parties it was treated as such and a hearing on it was held prior to the trial on the merits. See Wagner v. Columbia Hospital Dist., 259 Or 15, 485 P2d 421 (1971).

3. Article XXXI of the collective bargaining agreement specifically covering owner-operators, provides in part:

> "Section 18.
> Handling Grievances.
> "(a) The use of individual owner-operators shall be permitted by all certificated or permitted carriers who will agree to submit all grievances pertaining to owner-operators to joint committee in this area. * * * "

Defendant argues that plaintiffs have failed to exhaust these mandatory grievance procedures and thus the circuit court was without jurisdiction to hear this case.

In essence, the defendant alleges that the plaintiffs have breached their collective bargaining agreement by failing to submit to the grievance procedures and thus are barred from seeking recourse in the courts. In Textile Workers v. Lincoln Mills, 353 US 448, 451, 77 S Ct 912, I L Ed 2d 972 (1957), the United States Supreme Court held that §301(a) of the Labor Management Relations Act of 1947, 29 USC §185(a):[4]

---

4. Section 301(a) of the Labor Management Relations Act of 1947, 29 USC §185(a), reads:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

> " * * * authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements. * * * " 353 US at 451.

State courts have concurrent jurisdiction with federal courts in applying this "body of federal law." William E. Arnold Co. v. Carpenters District Council, ____US____, 94 S Ct 2069, 40 L Ed 2d 620 (May 20, 1974); Dowd Box Co. v. Courtney, 368 US 502, 82 S Ct 519, 7 L Ed 2d 483 (1962); State ex rel Nilsen v. Berry, 248 Or 391, 434 P2d 471 (1967).

The law is well settled that in the ordinary situation an employee who is subject to a collective bargaining agreement which contains mandatory grievance procedures must first look to those procedures as the vehicle for redress. One who fails to exhaust those procedures will find access to the courts barred. Vaca v

Sipes, 386 US 171, 87 S Ct 903, 17 L Ed 2d 842 (1967); Republic Steel Corporation v. Maddox, 379 US 650, 85 S Ct 614, 13 L Ed 2d 580 (1965); and State ex rel Nilsen v. Berry, supra.

In Maddox the court held that an Alabama state court was without jurisdiction to hear an action by a former employee for wrongful discharge where the employee made no effort to utilize the grievance procedures provided in the collective bargaining agreement.

> "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress. * * * " 379 US at 642. (Emphasis in original, footnote omitted.)

Vaca concerned an employee's action for damages against his union in which the employee alleged that the union failed to fairly represent him in the grievance procedure. In the course of its opinion

the court reiterated the rule enunciated in Maddox:

> "* * * [I]f the wrongfully discharged employee himself resorts to the courts before the grievance procedures have been fully exhausted, the employer may well defend on the ground that the exclusive remedies provided by such a contract have not been exhausted. Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. * * * ". 386 US at 184.

Vaca, however, recognized that the above stated rule is not to be applied universally but is subject to certain exceptions. "[B]ecause these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant." 386 US at 185.

The first exception which is rele-

vant to this case arises when the union breaches its duty of fair representation to the employee. Vaca v. Sipes, supra, 386 US at 177, 185. Several years ago the United States Supreme Court imposed upon the unions a duty to fairly represent not only the union membership as a whole but also each individual within the group. Steele v. L. & N. R. Co., 323 US 192, 65 S Ct 226, 89 L Ed 173 (1944). When the union breaches this duty the employee may seek judicial enforcement of his rights against the employer, and this is true although the employer did not participate in the breach. Vaca v. Sipes, supra at 185; Schum v. South Buffalo Railway Co., 496 F2d 328, 331-332 (2d Cir 1974).

The standards to which a union is held are summarized in Griffin v. International U., United Automobile, A. & A.I.W., 469 F2d 181, 183 (4th Cir 1972);

> " * * * A union must conform its behavior to each of these three separate standards. First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action."

See Clark, The Duty of Fair Representation: A Theoretical Structure, 51 Tex L Rev 1119 (1973).

A union may breach its duty of fair representation by arbitrarily refusing to press the employee's grievance or by handling it in a perfunctory manner. De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F2d 281 (1st Cir 1970), cert. denied 400 US 877, reh. denied 400 US 953, 401 US 926; Griffin International U., United Automobile, A. & A.I.W., supra; Smith v. Pittsburgh Gage and Supply Company, 464 F2d 870 (3d Cir 1972). And one court

has held that a union has violated its duty of representation when its handling of the employee's grievance was substandard. Thompson v. International Association of Machinists, 258 F Supp 235 (ED Va 1966).

> " * * * [W]hen the union has chosen--or simply fallen into--a path of representation that is significantly inferior to an alternate path that would not have added substantially to the burden on the union's resources, the perfunctory-substandard test should apply and require the union to explain its choice. Cases such as Thompson, de Arroyo, and Griffin seem to be moving toward placing the burden of convincing explanation on the union." Bryson, A Matter of Wooden Logic: Labor Law Preemption and Individual Rights, 51 Tex L Rev 1037, 1102-03 (1973).

A number of well-reasoned decisions have also rejected the requirement that the union's conduct must be not only arbitrary but also in bad faith. DeArroyo v. Sindicato de Trabajadores Packinghouse, supra 425 F2d at 284. See also Beriault v. Local 40, Super Cargoes & Check. of I.L. & W.U., 501 F2d 258 (ith Cir 1974), revers-

ing 340 F Supp 155 (D Or 1972), and cases cited therein. We agree that a bad faith requirement unduly restricts the duty of fair representation.[5]

Although an individual employee does not have an absolute right to have his grievance taken through all the steps of the grievance procedures, he does have a right to demand that the union protect his rights in good faith and in a non-arbitrary manner. Vaca v. Sipes, supra 386 US at 194. See also Thommen v. Consolidated Freightways, 234 F Supp 472, 474

5. "A bad-faith standard of fair representation cannot enforce the union's affirmative responsibilities. It can prohibit invidious distinctions like race and possibly sex, and it can inhibit deliberate attempts to sacrifice the rights of individual employees, but it cannot ensure that a union will offer minimal representation to all the employees it serves. In brief, a bad-faith standard allows unions to make unfounded decisions as long as there is no evidence of deliberate wrongdoing." Clark, The Duty of Fair Representation: A Theoretical Structure, 51 Tx L Rev 1119 (1973).

(D Or 1964); Wagner v. Columbia Hospital Dist., 259 Or 15, 485 P2d 421 (1971).

A new and less clearly defined exception to the duty to exhaust mandatory grievance procedures is the futility exception enunciated in Glover v. St. Louis-S.F. R. Co., 393 US 324, 89 S Ct 548, 21 L Ed 2d 519 (1969).[6] In that case the plaintiffs brought an action against their employer and their union alleging that the employer and union acted in concert to bar negro employees from promo-

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6. Due to the fact that the futility exception is so closely related to the breach of the duty of fair representation exception, some authorities feel that the author of Glover, Justice Black, may have merely been expanding on the duty of fair representation exception. See Local U. No. 90, A.F.G.W.U. v. American Flint Glass Wkrs.' U., 374 F Supp 600 (D Md 1974). See also Simpson and Berwick, Exhaustion of Grievance Procedures and the Individual Employee, 51 Tex L Rev 1179, 1210-13 (1973). The distinction as to whether Glover established a new exception or broadened an old one is of little practical importance.

tion wholly because of race. In discussing exhaustion of remedies, the court said:

> " * * * The Court has made clear * * * that the exhaustion requirement is subject to a number of exceptions for the variety of situations in which doctrinaire application of the exhaustion rule would defeat the overall purposes of federal labor relations policy. * * *.
>
> " * * * * * .
>
> "The Court in Vaca went on to specify at least two situations in which suit could be brought by the employee despite his failure to exhaust fully his contractual remedies. The circumstances of the present case call into play another of the most obvious exceptions to the exhaustion requirement--the situation where the effort to proceed formally with contractual or administrative remedies would be wholly futile. * * * " 393 US at 329-30.

The facts in Glover indicate that the employees repeatedly had complained to the union and the employer, and their requests for action were either ignored or perfunctorily rejected. The court felt that it would be futile to require the employees to submit themselves "to any remedy ad-

ministered by the union, by the company, or both, to pass on claims by the very employees whose rights they have been charged with neglecting and betraying." 393 US at 330-331. See also Steele v. L. & N.R. Co., supra.

It is true that a few courts have read Glover so restrictively as to limit it to suits alleging racial discrimination. See e.g., Fulsom v. United-Buckingham Freight Lines, Inc., 324 F Supp 135, 137 n. 1 (WD Mo 1970), and Bowen v. Lockheed-Georgia Company, 309 F Supp 1210, 1215 (ND Ga 1970). And other courts have applied Glover primarily when there has been collusion between the union and the employer. See e.g., Orphan v. Furnco Construction Corporation, 466 F2d 795 (7th Cir 1972), and Lusk v. Eastern Products Corporation, 427 F2d 705 (4th Cir 1970).

We believe, however, that the better

view is the one adhered to by the Ninth Circuit Court of Appeals. In Retana v. Apartment, Motel, Hotel and El. Op. U., Loc. No. 14, 453 F2d 1018 (9th Cir 1972), the court placed emphasis on the fact that the employees had made repeated requests to the union for redress of their grievances:

> "* * * Proof of appellant's allegations that she repeatedly solicited the union's assistance without result might excuse failure to exhaust union remedies on the ground that she reasonably believed further efforts to invoke such remedies would be futile." 453 F2d at 1027-1028.

See also Seay v. McDonnell Douglas Corporation, 427 F2d 996, 1001 (th Cir 1970). Accord, Smith v. Pittsburgh Gage and Supply Company, 464 F2d 870 (3d Cir 1972); Waters v. Wisconsin Steel Wks. of International Harvester Co., 427 F2d 476, 490 (7th Cir 1970), cert. denied 400 US 911; Derr v. Bright, 297 F Supp 12 (MD Pa

1969).[7]

In summary, the Glover futility exception should apply whenever the facts of the case indicate that an employee's grievance would not receive the fair consideration and good faith evaluation that is required in a mandatory grievance

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7. The reasoning in these cases also finds support from language in Glover:

" * * * [T]he attempt to exhaust contractual remedies, required under Maddox [Republic Steel Corporation v. Maddox, 379 US 650, 85 S Ct 614, 13 L Ed 2d 580 (1965)] is easily satisfied by petitioners' repeated complaints to company and union officials, and no time-consuming formalities should be demanded of them. * * * " 393 US at 331 (Emphasis in original)

Simpson and Berwick, supra n. 6, point out that:

> "* * * Justic Black may well have inserted the attempt discussion--essentially surplusage--to encourage lower courts to view repeated importunities to union officials or to the employer as sufficient attempt. * * * " (Footnote omitted.)

procedure.[8] See Waters v. Wisconsin Steel Wks. of International Harvester Co., supra 427 F2d at 490; Day v. United Automobile, Aero. & Agr. Imp. Wkrs., Local 36, 466 F2d 83, 96 (6th cir 1972); de Arroyo v. Sindicato de Trabajadores Packinghouse, supra 425 F2d at 283; Wagner v. Columbia Hospital Dist., supra at 27-28. See also Simpson and Berwick, Exhaustion of Grievance Procedures and the Individual Employee, 51 Tex L Rev 1179, 1213.

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8. Another exception, clearly inapplicable to this case, exists where the employer repudiates the private grievance machinery or has engaged in other conduct which effectively estops him from relying on the unexhausted grievance procedures. Vaca v. Sipes, 386 US 171, 185, 87 S Ct 903, 17 L Ed 2d 842 (1967).

Applying the above rules of law to the facts of the instant case, we believe the plaintiffs are excused from exhausting the mandatory grievance procedures provided in the collective bargaining agreement.

Plaintiffs occupy a unique and apparently disadvantageous position in their relationship with the employer and the union. As employees of Mitchell Bros., they had the traditional benefits and responsibilities of union membership. However, they were also entrepreneurs who purchased and leased out their own equipment. In this sense they did not occupy a traditional employee role.

The leases in question were the sole product of negotiations between the plaintiffs and Mitchell Bros. There was no union participation. Indeed, although the collective bargaining agreement required that a copy of each lease be filed

with the union, none in fact ever were. And, although the collective bargaining agreement specified certain mandatory language to be included in all lease agreements,[9] these leases did not contain that language.

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9. "Section 19.
Mandatory Language for Agreements.

"All leases, agreements, or arrangements between carriers and owner-operators shall contain the following statement:

"'The equipment which is the subject of this lease shall be driven by an employee of the lessee at all times that it is in the service of the lessee. If the lessor is hired as an employee to drive such equipment he shall receive as rental compensation for the use of such equipment no less than the minimum rental rates, allowances, and conditions (or the equivalent thereof as stated in the lease, and, in addition thereto, the full wage rate and supplementary allowances for drivers) or the equivalent thereof as approved by the Oregon Draymen and Warehousemen's Association.

(cont. on p. 23a)

As noted above, the plaintiffs demand reimbursement for four items: federal highway use taxes, federal gasoline taxes, permit load bonuses, and safety bonuses. Prior to taking legal action, plaintiff Eldon Gilstrap, representing himself and other owner-operators, discussed each matter with the union representatives. According to his testimony, the union took the position that it lacked jurisdiction in the case as the plaintiffs and

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9. (cont. from p. 22a)

"'The lessee expressly reserves the right to control the manner, means and details of, and by which the driver of such leased equipment performs his services, as well as the ends to be accomplished. To the extent that any provision of this lease may conflict with the provisions of the Oregon Draymen and Warehousemen's Association agreement as it applies to equipment driven by the owner, such provision of this lease shall be null and void and the provisions of such Agreement shall prevail."

Mitchell Bros. had entered into their lease agreements without union participation.[10]

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10. The facts in the case at hand are substantially similar to the fact situation in de Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F2d 281 (1st Cir 1970) cert denied 400 US 877. In that case, as here, there was no evidence of actual bad faith on the part of the union. The union in de Arroyo refused to press the employee's grievance because of a mistaken belief that the employee's grievance would be covered by a prior NLRB determination involving other employees. The court pointed out that this belief was clearly erroneous. In the present case the union was laboring under a belief that, due to the fact that the leases were negotiated without union participation, the union was without jurisdiction. This, too, was clearly erroneous in light of Article XXXI, § 18, of the collective bargaining agreement which states:

"The use of individual owner-operators shall be permitted by all certificated or permitted carriers who will agree to submit all grievances pertaining to owner-operators to joint committee in this area. * * *"

This oft-stated position by the union led the owner-operators to the conclusion that the union "would protect us in the same fashion they did the company drivers, but so far as the trucks on lease with Mitchell Bros. is concerned, they won't, they would give us no protection on that."

The impression by the owner-operators that they would receive little or no protection from the union in enforcement of their leases was apparently correct. A letter of July 6, 1971, from the attorney for the union to plaintiffs' attorney, received into evidence without objection, read in part:

> "It became obvious to all parties concerned that your clients had entered into individual lease agreements with Mitchell Bros. and did the same on their own initiative without any participation by our clients. Therefore, it would seem to us that your clients have embarked on an independent course of action separate and distinct from the union contract. ***"

This letter was written after legal action against Mitchell Bros. was instituted. However, it is relevant to confirm Gilstrap's testimony with regard to the union's prior position.

Gilstrap's testimony received other stronger confirmation. Mr. Calvin Rogers, business agent for Local 162 of the Teamsters Union, was called by Mitchell Bros. as a defense witness. On cross-examination he was read the above-quoted portion of the July 6 letter. He agreed that the union took the position that plaintiffs, by entering into individual lease agreements at the request of Mitchell Bros., had embarked on an independent course of action separate and distinct from the union contract.

The plaintiffs did belatedly file grievance procedures after the institution of their action. There is conflicting testimony as to whether this grievance

was later withdrawn by the plaintiffs. It appears that it would not have mattered whether plaintiffs withdrew their grievance in view of the union's position with regard to union members who employ outside counsel to represent them. On cross-examination Mr. Rogers was asked:

"Q: Did I understand you to say when any of the drivers who are members of the Teamsters Union employ outside counsel, for whatever reason, then it is the practice of the union, for whatever reason, not to proceed with any grievance proceedings?

"A: That is correct.

"Q: Has that been true for a number of years?

"A: Yes, sir.

"Q. What is the reason for that?

"A. The reason for that is we feel they are exhausting their remedy in another fashion and it puts the local union in a very untenable position."

A hearing was held on defendant's plea in abatement that the plaintiffs had failed to exhaust the grievance procedures set forth in the collective bargaining

agreement. From the foregoing facts it is clear that there was sufficient evidence to justify the trial court's ruling that the plaintiffs were entitled to a trial on the merits. First, the union failed to meet its duty to fairly represent the plaintiffs in their dispute with Mitchell Bros., and second, any recourse to the grievance procedures provided in the collective bargaining agreement would be wholly futile.

On the merits, the defendant contends that it is not liable to reimburse the owner-operators for federal fuel taxes and federal highway use taxes. It is important in this context to remember that all parties agree that both the plaintiffs and the defendant are subject not only to the provisions of the lease but also to the provisions of the collective bargaining agreement as it pertains to owner-

operators.

Paragraph 4 of the lease agreement provided that the "Lessee agrees to assume full responsibility for * * * highway use taxes * * *." Article XXXI, § 10, of the collective bargaining agreement provides, in pertinent part:

> "All taxes or additional charges imposed by law relating to actual truck operation and use of highways, no matter how computed or named shall be paid by the carrier, excepting only vehicle licensing as such, in the State where title is registered." (Emphasis added.)

In Asbury Trans. v. Cons. Freightways, 263 Or 53, 501 P2d 321 (1972), this court had occasion to interpret similar provisions. In that case both plaintiff and defendant were parties to a lease which contained the following:

> "4. LICENSE EXPENSE. The parties hereto shall bear and pay all fees for * * * Federal Highway Use Tax or other road or mile taxes, permits and travel orders, weight taxes and wheel taxes, fines, penalties and tolls, in accordance with the collective bargaining agreements, and any supplements

> thereto, to which reference is made in paragraph 10. [Emphasis supplied.]"

The collective bargaining agreement to which reference is made in Asbury provided:

> "All taxes or additional charges imposed by law relating to actual truck operation and use of highways, no matter how computed or named, shall be paid by the Carrier, excepting only vehicle licensing as such, in the state where title is registered." (Emphasis supplied.)

The court held:

> "Consequently, when the lease provides that the federal highway use tax and other road or mile taxes are to be paid according to the union agreement, and the union agreement provides that defendant is to pay all taxes relating to 'truck operation and use of highways,' the obligation for fuel and highway use taxes falls on defendant." 263 Or at 58.

The defendant, however, attempts to distinguish Asbury on two main grounds. First, it contends that the lease in Asbury referred specifically to federal highway use taxes, while the lease in this case refers only to "highway use taxes." In connection with this attempted dis-

tinction the defendant asserts that the federal highway use tax is not a highway use tax but rather is a "tax upon the use of any highway motor vehicle." This contention is without merit. The federal highway use tax, it is true, is a tax on the use of highway motor vehicles. 26 USC § 4481. If the trucks do not use the highway, then they are not subject to the tax.

> "An examination of the legislative history [of the federal highway use tax] reinforces the conclusion that in adopting this tax Congress did not intend to tax vehicles of a type not used for highway transportation. * * * [T]he taxes were all related to highway use, and their application was deliberately restricted to cases involving highway use. * * *." Rossi v. United States, 220 F Supp 694,696 (SD Me 1963). (Emphasis added.)

The federal highway use tax is a highway use tax and is therefore covered by paragraph 4 of the lease.

The defendant next contends that the lease in Asbury required Consolidated to

"bear and pay" the taxes while the collective bargaining agreement in this case requires that the lessor only "pay" the taxes in question. Thus Mitchell Bros. argues that it is entitled to make initial payment of the taxes to the government and then charge back the amount paid to the drivers. This argument is also without merit. Although the lease in Asbury was more precise than the agreements in this case, it is clear from a reading of Asbury that the court in no way rested its holding on the fact that that agreement required Consolidated to "bear" as well as "pay" the taxes. "Pay" must be given its usual meaning, that is, to satisfy someone for services rendered or property delivered, or to discharge an obligation. See Webster's Third New Int'l Dictionary at 1659 (1965).

We feel that our holding in Asbury is controlling in this case, and Mitchell

Bros. is responsible for the federal highway use taxes and the federal fuel taxes.

Finally, the defendant contends that the plaintiffs are covered by a 90-day limitation clause[11] in the collective bargaining agreement. Thus, any money claims not submitted in writing to Mitchell Bros. within 90 days must be deemed waived. An examination of Article VIII, relating to grievances in general, and its relationship to Article XXXI, § 18, relating to grievances between owner-operators and the employer, shows that the trial court was correct in holding that "the ninety day clause in the union agreement is not applicable in this case."

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11. Article VIII, § 3, provides in part:

"Any dispute as to the amount of money due any employee under this agreement or any supplement hereto shall be submitted in writing to the Employer or his authorized bargaining representative for investigation and adjustment. Any such dispute not submitted within ninety (90)

(cont. p 34a)

Article VIII, § 1, sets out the scope of the general grievance procedures:

"ARTICLE VIII
Disputes Procedure

"Section 1.
Disputes.

"All questions, disputes and controversies arising under this agreement or any supplement hereto, or between the parties as to employer-employee relations covered by this agreement, shall be adjusted and settled in the manner provided in this Article, unless otherwise expressly provided in this agreement." (Emphasis added.)

First, this dispute does not relate to employer-employee relations. Although the plaintiffs are employees, their claims arise from the lease agreements. Thus, the claims relate to lessor-lessee relations.

(cont. from p. 33a)

days of the pay day on which any such amount of money is claimed to have become due shall be deemed waived unless the Employer intentionally conceals the facts from which such dispute arises. This ninety (90) day limitation shall not be applicable if it is in conflict with State or Federal law. * * *"

Second, as § 1 above notes, the general grievance procedures are applicable "unless otherwise expressly provided in this agreement." Article XXXI, § 18 makes a separate express provision to cover grievances between owner-operators and the employer.[12] There is no 90-day limitation period in this section.

The plaintiffs allege that the trial court erred when it held that the plaintiffs had not satisfied the conditions required to receive the safety bonus and that no agreement had been reached with regard to the permit load bonus.

The trial court found that a bonus of three-fourths of a cent per mile would be paid in a one-year period, provided the driver did not have claims charged to him that aggregated more than $250 in the period. Plaintiffs contend that "claims"

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12. See footnote 3.

mean only cargo damage claims, while defendant contends that "claims" mean all claims, regardless of fault, must be considered.

There was a conflict in the testimony on this point and the trial judge, acting as trier of fact, found for the defendant. We will not disturb this finding on appeal. Honeywell, Admx. v. Turner, 214 Or 700, 332 P2d 638 (1958).

With regard to the safety bonus the trial court found that, at the July, 1969 meeting the plaintiffs had demanded 10 cents per mile, while the defendant would agree to no more than 3 and 1/3 cents per mile. The court found that no agreement was reached. Again, we will not disturb this finding on appeal. Honeywell, Admix. v. Turner, supra.

Affirmed.

APPENDIX B

STATE OF OREGON
SUPREME COURT
Supreme Court Building
Salem, Oregon 97310

Loren D. Hicks
State Court Administrator

January 3, 1975

Mr. Russell M. Allen
White, Sutherland, Parks & Allen
1200 Jackson Tower
Portland, Oregon 97205

Re: Gilstrap v. Mitchell Bros.

Dear Mr. Allen

The Supreme Court has today denied appellant's petition for rehearing in the above matter.

Very truly yours,

/s/ Adell Johnson

Adell Johnson
Assistant Administrator

AJ/t

cc: Mr. Roger G. Tilbury
1123 S.W. Yamhill Street
Portland, Oregon 97205

Mr. Howard Hilson
1606 Standard Plaza
Portland, Oregon 97204

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MAY 22 1975
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NO. 74-1239

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974

MITCHELL BROS. TRUCK LINES,
an Oregon corporation,

Petitioner,

v.

ELDON GILSTRAP, WARREN P. BLAND,
ROGER GILMORE, CLAUDIO MARTINEZ,
RAYMOND MORRIS and C. P. ZACHOW,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OREGON

BRIEF FOR RESPONDENTS IN OPPOSITION

ROGER TILBURY
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HOLLIS RANSOM
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Portland, Oregon 97204

Attorneys for Respondents

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THE STATE COURT HAD JURISDICTION TO DECIDE THIS CASE 4

(a) This action is for a breach of a lease agreement, a conventional common law action--well within the state court's jurisdiction and ken. They do not sue as union members or employees, but rather as lessors 4

(b) State courts retain jurisdiction over breach of contract actions, whether under a collective bargaining agreement or otherwise 8

PLAINTIFFS HAVE COMPLETELY EXHAUSTED ALL REMEDIES PRIOR TO THE FILING OF THIS CASE, WHICH WAS LITERALLY AND FACTUALLY THE LAST RESORT. MOREOVER EXHAUSTION IS NOT NEEDED UNDER THE UNION AGREEMENT, WHEN THE SUIT IS BASED UPON A BREACH OF A SEPARATE LEASE AGREEMENT 12

IT IS NOT NECESSARY TO EXHAUST COLLECTIVE BARGAINING GRIEVANCE PROCEDURES IN ANY EVENT, WHEN IT WOULD BE FUTILE TO RESORT TO SUCH PROCEDURES OR THE UNION HAS NOT PROVIDED FAIR OR ADEQUATE (OR ANY) REPRESENTATION. BOTH FACTORS ARE PRESENT HERE 23

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(a) THE UNION DID NOT PROVIDE FAIR (OR ANY) REPRESENTATION TO PLAINTIFFS, AND IN FACT, IGNORED THE LESSORS ALTOGETHER 25

(b) WHERE PURSUIT OF THE GRIEVANCE PROCEDURES WOULD BE A FUTILITY (AS HERE), SUCH POINTLESS EXERCISE IS NOT REQUIRED AS A PREREQUISITE TO A LAWSUIT FOR BREACH OF CONTRACT . . . 34

There is no conflict in the circuits where the facts are as blatant as these.

THERE IS AN INDEPENDENT STATE BASIS FOR THE DECISION OF THE OREGON COURT 38

Defendant has ignored the collective bargaining agreement, refused to comply with any of its terms, refused to appoint arbiters, and announced (in advance) it would not accept any decision not favorable to itself anyway. Defendant has waived the grievance procedures and is estopped to raise them as a defense.

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2 Williston Contracts (3rd ed) 985	11
29 USC §164(c)	10
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974

NO. 74-1239

MITCHELL BROS. TRUCK LINES,
an Oregon corporation,

Petitioner,

v.

ELDON GILSTRAP, WARREN P. BLAND,
ROGER GILMORE, CLAUDIO MARTINEZ,
RAYMOND MORRIS and C. P. ZACHOW,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

PRELIMINARY STATEMENT

For brevity we will refer to petitioner Mitchell Bros. Truck Lines as defendant or Mitchell, and to respondents as plaintiffs.

The opinion of the Oregon Supreme Court appears as Appendix A in petitioner's brief. We have attached to this brief the two opinions of the trial court (the Circuit Court for Multnomah County, Oregon) as Appendices B and C, a copy of the equipment lease between plaintiffs and defendant (Appendix D) and pertinent portions of the collective bargaining agreement between the Teamsters and defendant (Appendix E). We have also followed defendant's numbering system, by numering the pages 1b, 2b, etc., for the four appendices.

STATEMENT OF FACTS

Defendant's perfervid brief does not comply with this court's Rule 23(4). Much of what passes as alleged facts is inaccurate and jaundiced. A new factual statement is mandated.

Plaintiffs are six former truck owners, who leased to defendant under standard form leases prepared by defendant (App D). They agreed to drive their own trucks as Mitchell's employees.

Shortly after the case was filed, for frankly retaliatory reasons, Mitchell terminated the leases of all six, and suspended all but one as drivers. Mitchell also impounded the trucks of two plaintiffs (for a time), threatened to cancel their insurance, and arrest them if they moved their own trucks from Mitchell's lot.

The class action aspect was ultimately denied. However, before a poll of driver

sentiment could be taken, defendant threatened that all who joined would be subject to a counterclaim, plus costs and disbursements.

Most lessors--and all drivers--are Teamster members. Over the years (in keeping with other Teamsters) the salary of the drivers has risen. But, unlike other carriers, Mitchell nullified these wage gains by deducting the driver's enhanced wages from lease payments. The result was an increase in wages to the drivers, but a decrease in lease payments in like amount. This practice was explicitly forbidden by the union agreement,[1] which specified that "mandatory" language prohibiting this be inserted in the lease itself.[2] Mitchell ignored this too. Moreover, the union contract required a

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1. Art. XXXI, § 6 (App E)

2. §19 of Article XXXI (App E)

copy of each individual lease be filed with the union. Instead, Mitchell filed a copy of a blank form of lease. (The critical portions of the union agreement appear in Appendix E. The lease is Appendix D).

Local 24, International Teamsters, etc. v. Oliver, 358 U.S. 283, 79 S.Ct. 297, 3 L.Ed.2d 312 (1958) discussed this identical clause in another lessor-driver case. Justice Brennan noted (1c 287):

> "The parties declare that 'the intent of this clause [the Article] ...is to assure the payment of the Union scale of wages...and to prohibit [a carrier from] the making and carrying out of any plan, scheme or device to circumvent or defeat the payment of wages scales provided in this Agreement...[and] to prevent the continuation of or formation of combinations or corporations or so-called lease of fleet arrangements whereby the driver [of his own vehicle] is required to and does periodically pay losses sustained by the corporation or fleet arrangement, or is required to accept less than the actual cost of the running of his equipment, thus, in fact, reducing his scale of pay.'"

DECISION BELOW

Both the Circuit Court of Multnomah County and the Supreme Court of Oregon (unanimously and in banc) ruled that plaintiffs were entitled to reimbursement for federal highway use and federal fuel taxes, but were not entitled to recover for unpaid safety bonus or permit load compensation.

THE STATE COURT HAD JURISDICTION TO DECIDE THIS CASE

(A) This action is for breach of a lease agreement, a conventional common law action--well within the state court's jurisdiction and ken.

A critical fact, ignored by defendant, is that plaintiffs sue primarily as lessors for breach of the lease agreement. The union had no part in the negotiation of the lease. The union also declined to assist plaintiffs or any other lessors in enforcing the terms of the lease, as discussed more fully infra p 21.

The union intensely disliked leases because of the problem mentioned in the Oliver case.[3]

This case was brought in plaintiffs' capacity as lessors, and not as drivers.[4]

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3. See p 3 , supra.

4. Circuit Judge Olsen commented (1-2b) that: "plaintiffs first seek damages for breach of the Equipment lease as the same was amended by an oral agreement made in July, 1969... (with respect to) a bonus of 3/4 cent for each mile driven . ."
"In the second cause of action the plaintiffs seek payment of a bonus in the amount of 3 and 1/3 cent per mile driven by the plaintiffs while hauling 'permit loads'.
"The third cause of action relates to Paragraph 4 of the Equipment lease."

Only with respect to the fourth cause of action (the federal fuel tax) did he make any reference of any kind to the collective bargaining agreement (4b).

The Supreme Court of Oregon noted in its opinion that (2a):
"This is an action at law in which plaintiffs, owner-operators of commercial trucks, seek money damages for breach of certain lease agreements with defendant Mitchell Bros. Truck Lines."

The first two items (safety bonus and permit hauling) were oral promises made by Mitchell only to the lessors, and are not in the union agreement. The third item (highway use tax) is covered by the explicit and unambiguous language of the lease under which the:

> "Lessee [Mitchell] agrees to assume full responsibility for the equipment leased while the same is in Lessee's possession, said responsibility to include... highway use taxes...".

The fourth item (federal fuel tax) is covered by this same language since such tax is measured by highway usage and is "computed on the number of miles driven

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4. (cont)
Later the court added (5a): "In summary, plaintiffs are asserting rights based on the lease, the collective bargaining agreement, and oral promises allegedly made at the July 12 meeting.

The oral promises were modifications of the lease--not the collective bargaining agreement. The union did not participate in the July 12 meeting.

in the state on an average miles per gallon basis.[5]

It is true that further confirmation of Mitchell's responsibility for highway use and federal fuel taxes is found in the language of the union agreement (Art XXXI, Section 10) as both the Oregon Circuit Court and Supreme Court noted. (29a-33a,4b).

However, the primary basis of recovery throughout was the breach of the lease. The Oregon Supreme Court noted (24a):

> "First, this dispute does not relate to employer-employee relations. Although the plaintiffs are employees, their claims arise from the lease agreements. Thus the claims relate to lessor-lessee relations."

Plaintiffs were paid their wages as drivers. But they were shorted their lease payments by Mitchell, which insisted

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5. 26 USC §4040(a); IRS Publication 378 (rev 10-72); Asbury Transportation v. Consolidated Freightways Corp., 263 Or 53, 56, 501 P.2d 321, 322 (1972).

on deducting the highway use and federal fuel taxes, subsistence and driver's wages.

Not all the lessors were drivers. Neither were all drivers lessors.

(B) State courts retain jurisdiction over breach of contract actions whether under a collective bargaining agreement or otherwise.

This court has repeatedly made it clear that suits for breach of collective bargaining agreements under 29 USC 185a may be brought by employees against their employer or their union in appropriate cases in either federal or state court, even where the breach also constitutes an unfair labor practice.[6] In our case,

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6. Humphrey v. Moore, 375 US 335, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964); Dowd Box Co. v. Courtney, 368 US 502, 505-506, 511, 82 S.Ct. 519, 7 L.Ed.2d 483; Local 174 Teamsters, etc. v Lucas Flour Co., 369 US 95, 101, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962); Smith v. Evening News Assn, 371 US 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962); Atkinson v. Sinclair Refining Co., 370 US 238, 82 S.Ct. 1318, 8 L. Ed.2d.462 (1962).

however, the task is simpler, because no one contends there was an unfair labor practice here.

In enacting the NLRA, Congress did not include breach of union contract among the labor practices made unlawful under Section 8. Proposals to do so were made in 1947 during the Congressional debates leading to the enactment of the 1947 amendments, but were rejected.[7]

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7. As stated in Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp, 348 US 437, 75 S.Ct. 488, 99 L.Ed. 510 (1955) in discussing the LMRA: "It is significant, however, that breach of contract is not an 'unfair labor practice.' A proposal to that end was contained in the Senate bill, but was deleted in conference with the observation: 'Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.' (H.R. Conf. Rep No. 510, 80th Cong, 1st Sess 42)." (Underlining supplied)

A somewhat abortive attempt was once made by the NLRB to treat breaches of collective bargaining agreements

as unfair labor practices in Miranda Fuel Company, 140 NLRB 181, 51 LRRM 1584 [1962]. However, the Second Circuit denied enforcement of the NLRB order (NLRB v. Miranda Fuel Co., 326 F2d 172 [2d Cir 1963] and its jurisdiction to take cognizance of the breaches has been "cast in doubt" (73 Yale LJ 1215, 1237 [1964]). Subsequently, the NLRB has applied Miranda only with great timidity and only in racial discrimination cases and generally has been "spooked by its own jurisdictional limitations" (51 Texas LR 1037, 1075, 1076, 1079, 1084, 1108 [1973]; see also Smith v. Local No. 25 (5th Cir) 500 F2d 741, 747 [1974].

Irrespective of the NLRB's theoretical jurisdictional limits, it is of academic interest only here, for the NLRB has already determined it lacks jurisdiction of this controversy since it involves the "interpretation or reformation of equipment lease agreements" which " is not a refusal to engage in collective bargaining as contemplated by Section 9(a) (5) of the Act" (NLRA). (Ex 18)

This court has held that a state court may assume jurisdiction even of labor disputes (and a breach of a lease agreement is not such dispute) where the NLRB has jurisdiction but declines to assert it. (Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc. 380 US 255, 85 S Ct 876, 13 L Ed 2d 789 [1965]. Further §14c was passed by an indignant Congress (29 USC §164[c]) to close the

When the bill which later became 29 USC §185a reached the Senate, Senator Ferguson (Dowd Box Co. v. Courtney, 368 US 502, 512, 82 S.Ct. 519, 7 L.Ed.2d. 483, 489):[8]

> "stated unequivocally that state court jurisdiction would not be ousted by enactment of the federal law."

Permitting state courts to enforce collective bargaining agreements is no disservice to the interest promoted by the federal labor statutes, since federal law still governs,[9] as the Oregon Supreme

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7. (cont) phenomenon of the no-man's land, shortly after Guss v. Utah Labor Relations Board, 353 US 1, 77 S.Ct. 598, 1 L.Ed.2d. 601 (1957) was decided. (See also 29 USC §523[a]).

8. It is now generally recognized that an employee may sue his employer to collect benefits accruing to the employee under a collective labor agreement made between his employer and the union, though the precise theory has given rise to some academic debate. See 2 Williston, Contracts (3rd ed) 985, §379A and Annotation, 18 ALR 2d 352; 3 Buffalo LR 270; McKay v. Loew's, Inc. (9th Cir 1950) 182 F.2d 170; Marranzano v. Riggs Nat. Bank (DC Cir 1950) 184 F.2d 349.

Court has acknowledged.[10]

ALL ALTERNATIVE REMEDIES WERE EXHAUSTED BY PLAINTIFFS PRIOR TO THE FILING OF THIS CASE, THIS WAS LITERALLY THE LAST RESORT. MOREOVER, EXHAUSTION OF ALL REMEDIES UNDER THE UNION AGREEMENT WAS NOT NEEDED ANYWAY SINCE THIS SUIT IS BASED UPON BREACH OF A SEPARATE LEASE AGREEMENT.

Defendant asserts that since plaintiffs allegedly did not fully exhaust the grievance procedures of the joint bargaining agreement this case should be dismissed.

There are several answers to this.

First, the primary claim in this case has no relationship to the joint bargaining agreement, but is predicated upon a breach of the lease. We ask merely that the

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9. Textile Workers Union v. Lincoln Mills, 353 US 448, 77 S.Ct. 912, 1 L.Ed.2d. 972 (1957); International Brotherhood of Boilermakers v. Hardeman, 401 US 233, 241, 91 S.Ct. 609, 615; 28 L.Ed.2d. 10 (1971); 51 Texas LR 1037, 1115 (1973).

10. 8a; see also State v. Berry, 248 Or 391, 434 P.2d 471 (1967).

unambiguous terms of the lease be enforced. In the words of the NLRB Regional Director, the issue here was the "interpretation" of "equipment lease agreements" (Ex 18).

Second, even though not required to do so, plaintiffs did exhaust all other possible avenues for redress. The filing of this lawsuit was the only route left. The extent of some of these efforts was capsulated by a very frustrated Roger Gilmore, one of the plaintiffs, when he wrote the following (Ex 29):

EXHIBIT
CASE No
NOW OFFERED &
OLSEN
JUDGE

3215 S.E. 135th Avenue
Portland, Oregon 97233
March 28, 1973

General Teamsters Auto Truck Drivers
& Helpers Local No. 162
1020 NE Third Avenue
Portland, Oregon 97232

Attn: Calvin Rogers,
Business Agent

Gentlemen and Brothers:

As you know, for years many of us have been trying to get Mitchell Brothers to live up to their agreement to pay all of us who are driver lessors what we are legitimately entitled to receive.

They refuse.

We have also tried for years to have these grievances heard some place, by someone. We first went to the NLRB--and they said they had no jurisdiction. We also went to Mitchell Brothers, and they told us, in effect, to drop dead. We also filed a grievance through the union, but we were told that this was the wrong route, too. Finally we filed a lawsuit in the Circuit Court for this county. In court, Mitchell Brothers insists that we must proceed through the union, although, of course, their true objective is to merely drive us into another blind alley. Mitchell Brothers also has urged us to sue the union. Of course, we have never wanted to do this and do not feel this would be right, and we have told Mitchell precisely this.

It is our clear understanding that the union--both local and international--does not wish to hear these grievances and would prefer that we take the matter to court. This we have been told many times. However, to make absolutely certain this is still your position, we called Clyde Crosby, the international representative, and he again referred us to you. We then made an appointment to see you on Friday at 9:00 A.M. However, you have now cancelled this appointment. We assume that once more the union does not wish to hear the matter. If such is not the case, please let us know at once.

Many thanks.

Fraternally yours,

Roger Gilmore

cc: Clyde Crosby

What he said was true. Not only for himself, but for the other plaintiffs as well.

Defendant tries to split the plaintiffs by stressing the actions of the two (Gilmore and Gilstrap) who were the most vocal. However, defendant does not mention that Gilstrap spoke not only for himself but also as a member of a committee of lessees who were elected to discuss these matters with defendant (23a).

Defendant implies plaintiffs did nothing until this lawsuit was filed. Such is false.

This case was filed December 24, 1970. For years both prior and subsequent to that date defendant was bombarded with complaints. Plaintiffs Gilstrap and Morris, for example, complained of these deductions when they received their first lease checks. For Gilstrap this was shortly after April

26, 1967. He continued to complain throughout both to the union and Mitchell, though told it would do no good. Finally, he was elected a member of a lessor committee intended to protect all of them, and filed a formal written grievance as well. Plaintiff Bland talked to the shop steward at Mitchell's, but was told "it would do no good to file a grievance because they were not going to get anywhere with it". He also talked to Mitchell's assistant general manager "often, whenever I would see him." He drove for Mitchell from 1961-4 and 1969-1971. Bob Pellissier, who had driven for Mitchell since February, 1962, testified the lessors asked Mitchell to make these tax payments "through the years."

Not only was it discussed individually by plaintiffs and other lessors, but it arose at virtually all--if not all--of the periodic meetings between Mitchell and the lessors.

From the beginning plaintiffs stressed their willingness to arbitrate or take the matter to the NLRB or anyplace wherever a fair hearing could be obtained. All these avenues proved to be dead ends. Mitchell did nothing except cry "wrong" as each successive possibility was exhausted. Its attitude towards arbitration is illustrated by its attorney's letter, after plaintiffs requested arbitration. He wrote the union (Ex 39):

> "Frankly, we would not object in the least if the Union does nothing and if the grievance procedures are not followed."

That is precisely what was done--nothing.

Mitchell blocked arbitration and refused to take any of the grievance steps. Mitchell should, in fairness, be estopped from raising the defense of exhaustion of remedies. The grievance procedures pertaining to lessor-drivers is found in Art. XXXI, Section 18. It provides:

> "(a) The use of individual owner-operators shall be permitted by all certificated or permitted carriers who will agree to submit all grievances pertaining to owner-operators to joint committee in this area."

Yet Mitchell refused to submit owner-operator grievances (including plaintiffs') to the joint committee.[11]

The general grievance procedures for drivers appear in Art. VIII although, as the Oregon Supreme Court has noted, plaintiffs' claims "arise from the lease agreements" and not as drivers. Nevertheless, and even if it applied, it would not assist defendant. It sets forth a six-step grievance procedure (see le , infra, Appendix E).

The employee's role is limited to step one; i.e., he takes his grievance (and it

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11. Nor was this the only respect in which Mitchell refused to abide by the collective bargaining agreement or lease, as the Oregon Supreme Court mentioned. (See 21a, 22a).

need not be in writing, to his immediate supervisor". All successive steps are out of his control and must be taken by the union and/or employer. The Joint Committee, for example, is appointed half by management, half by labor. They, in turn, select an Arbiter, if needed.

Mitchell declined to take any of the steps, including the appointment of its half of the joint committee and/or arbiter--and so did the union.

Even more revealing is Mitchell's contemptuous attitude towards the entire grievance procedure. When asked whether Mitchell would be willing to abide by a decision of an arbitrator (if one were to be appointed and if the arbitrator ruled against Mitchell), Mitchell's attorney replied (Tr 235):

> "No, absolutely not. We will find other realistic arbitrators."

Only once over the years has any lessor-driver been able to invoke the grievance procedures, despite the fact that Mitchell employs upward of 100 of them. Even then, no decision was reached as to the merits of the claim. Rather, Mitchell managed to prevail on one of its many procedural defenses. Further, that grievance hearing postdated the filing of plaintiffs' complaint, a fact which raises a high index of suspicion as to the true motivation. Moreover, the type of hearing given that lessor (Logan) does not bode well for the success of that route. He filed his own grievance and tried to represent himself at the arbitration. Logan went to the hearing room with all his "folders and stuff in my hand". He was met by the union attorney, who told Logan "he was going to put on my case", and secondly:

> "to shut my mouth up. I tried to get this grievance filed with Mitchell Bros., and he assured me

> that they were not going to file them that day--that I was not allowed to file one grievance on the joint conference and actually I intended to get that grievance filed, and he told me several times to shut my mouth or the meeting would be adjourned."

Needless to say, he did not feel the union was protecting his interest (Tr 255).

In the end, Logan lost.

Plaintiffs encountered this same indifference--only more so--when they asked the union to assert the claims at bar.

The union's insouciance is illustrated by:

(a) their pointed refusal to file grievances for the lessor-drivers;

(b) the union's business agent never took the time to obtain a copy of the lease between Mitchell and any of its lessor-drivers, much less read it;

(c) the union business representative led the lessors to believe there was nothing in the union "contract

whatsoever covering owner-operators' leased equipment", and "there was nothing under the [union] contract that covers owners-operators". The union told plaintiff Gilstrap, regarding the unpaid bonus agreement, that:

> "it was not under their jurisdiction, that they had no control of any contracts made between Mitchell Bros. and the truck owner-operators, and also that it was never reduced to writing like the agreement was between the company and the union, and they refused to take any action for bonus money I had coming".

(d) the union was oblivious or indifferent to the fact that as wage increases were negotiated, Mitchell deducted an equivalent amount from the lease settlements.

(e) efforts to interest the International met the same fate.

The union attorney told plaintiffs that "since they had entered into individual

lease agreements with Mitchell Bros. and did the same on their own initiative, he refused to help". When two plaintiffs tried to talk to him (and two other union representatives), they were told to "shut up" and not to bother him "because he was a busy man". Neither one "got to say hardly anything".

Once more, the lessors received no union help.

IT IS NOT NECESSARY TO EXHAUST COLLECTIVE BARGAINING GRIEVANCE PROCEDURES, WHEN IT WOULD BE FUTILE TO RESORT TO SUCH PROCEDURES OR THE UNION HAS NOT PROVIDED FAIR OR ADEQUATE REPRESENTATION. BOTH FACTORS ARE PRESENT HERE.

Plaintiffs do not sue as drivers or as union members, but as lessors. Therefore, it was not necessary to exhaust the grievance procedures of the collective bargaining agreement, in order to recover for the breach of the unrelated lease agreement. But even assuming, purely arguendo, these first two facts were not

true, still defendant's defense is not supportable because it is not necessary to exhaust grievance procedures under a collective bargaining agreement when:

(a) the union has breached its duty of fair representation, or

(b) resort to such procedures would be futile.

Both were present here, as the Supreme Court of Oregon has determined (28a).

In addition, defendant has waived this defense--and is also estopped from doing so--because:

(a) For years defendant refused to appoint its half of the grievance committee and in plaintiffs' case in particular;

(b) plaintiffs could not invoke the grievance procedure beyond step 1, which they took. Only management and/or the union could do so--and both refused.

(c) defendant announced in advance it would not abide by any arbitration decision anyway unless that decision were favorable to itself.

THE UNION DID NOT PROVIDE FAIR REPRESENTATION TO PLAINTIFFS.

This court, and many others, have long recognized it is not necessary to pursue the collective bargaining procedure where the union declines to fairly represent the grievant.[12] Under such circumstances the

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12. Glover v. St. Louis-S.F. Rr, 393 US 324, 89 S.Ct. 548, 21 L.Ed.2d. 519, (1969); Czosek v. O'Mara, 397 US 25, 28, 90 S.Ct. 770, 25 L.Ed.2d. 21 (1970); Conley v. Gibson, 355 US 41, 45-46, 78 S.Ct. 99, 2 L.Ed. 2d. 80 (1957); Vaca v. Sipes, 386 US 171, 186, 87 S.Ct. 903, 914, 17 L.Ed.2d 842 (1967); Hiller v. Liquor Salesmen's Union (2d Cir), 338 F.2d. 778; Hardcastle v. Western Greyhound Lines (9th Cir) 303 F.2d 182, cert den 371 US 920, 83 S.Ct. 288, 9 L. Ed.2d. 229; Schum v. South Buffalo Ry Co (2nd Cir 1974), 496 F.2d 328; de Arroyo v. Sindicato etc, (1st Cir 1970), 425 F.2d 281, 283, cert den 400 US 877 (1970); Seay v. McDonnell Douglas Corp (9th Cir 1970), 427 F.2d 996, 1002; Smith v. Pittsburgh Gage & Supply Co., (3rd Cir 1972) 464 F.2d 870, 875.

grievant may test the merits of his claim in court, rather than be forced into a grievance hearing where the cards are stacked against him. Since unions are the beneficiaries of considerable delegated federal power, responsible government must be concerned with the way in which such private organization exercises such power[13] and has every right to expect that due process be extended to such proceedings.[14]

Despite the contrary implications in defendant's brief, it is not necessary to show union bad faith, deceit, malice or dishonesty in order to state a claim for relief for breach of duty of fair

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13. Steele v. Louisville & Nashville Ry Co., 323 US 192, 202, 65 S.Ct. 226, 89 L.Ed. 173 (1944); 67 Yale L.J. 1327, 1340 (1958).

14. International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, AFL-CIO v. Hardeman, 401 US 233, 246, 91 S.Ct. 609, 617, 28 L.Ed.2d. 10, (1971).

representation,[15] although such conduct would necessarily suffice. The Oregon Supreme Court adopted the following (14a, ftn):

> "'A bad-faith standard of fair representation cannot enforce the union's affirmative responsibilities. It can prohibit invidious distinctions like race and possibly sex, and it can inhibit deliberate attempts to sacrifice the rights of individual employees, but it cannot ensure that a union will offer minimal representation to all the employees it serves. In brief, a bad-faith standard allows unions to make unfounded decisions as long as there is no evidence of deliberate wrongdoing.' 51 Tex L.Rev. 1119 (1973)."

Even defendant concedes, at another point in its brief,[16]--and so does one of

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15. Vaca v. Sipes, 386 US 171, 191, 87 S.Ct. 903, 917, 17 L.Ed.2d. 842 (1967); Retana v. Apartment, Motel, Hotel and Elevator Operators Union (9th Cir 1972) 453 F.2d 1018, 1024; deArroyo v. Sindicato (1st Cir), 425 F.2d 281, cert den 400 U.S. 877 (1970); Beriault v. Local 40, Super Cargoes & Check of I.L.& W.U. (9th Cir 1974), 501 F.2d. 258, 264; Gillam v. Roadway Express, Inc., 1 Ohio App 2d. 548, 206 N.E. 2d. 34 (1965).

16. Petitioner's Br, p 25.

the two cases cited by defendant[17] (which it lists in support of its mistaken impression that there is a conflict in the Circuits on this point)--that arbitrary conduct on the part of the union is sufficient to constitute a breach of the duty of fair representation. Such has long been the rule of this court, and generally.[18]

In a recent case cited by defendant it was noted (Beriault v. Local 40 [9th Cir 1974], 501 F.2d 258, 264):

> "At least three other circuits also have examined the duty of

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17. Orphan v. Fernco Cons Corp (7th Cir 1972), 462 F.2d 794, 802

18. Amalgamaged Association of Street, Electric Railway & Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 299, 91 S.Ct. 1909, 1924, 29 L.Ed.2d. 473 (1971); Vaca v. Sipes, 386 U.S. 171, 193, 87 S.Ct. 903, 17 L.Ed.2d. 842 (1967); Czosek v. O'Mara, 397 U.S. 25, 90 S.Ct. 770, 25 L.Ed.2d. 21 (1970); Retana v. Apartment, Motel, etc. Union (9th Cir, 1972), 453 F.2d 1018; Griffin v. UAW (4th Cir 1972) 469 F.2d 181; Day v. UAW (6th Cir 1972), 466 F.2d 83; de Arroyo v. Sindicato (1st Cir 1970), 425 F.2d 281, 284; 51 Texas L.R. 1037, 1100 (1973).

> fair representation after both Vaca v. Sipes and Lockridge have concluded, as did we, that mere arbitrary conduct by the union in representing those within a particular bargaining unit constitutes a breach of that union's duty. Sanderson v. Ford Motor Co., 483 F.2d 102, 110 (5th Cir 1973); Woods v. North American Rockwell Corp, 480 F.2d 644, 648 (10th Cir 1973); Griffin v. UAW, 469 F.2d 181, 183 (4th Cir 1972)."

One would be hard put to find a clearer example of arbitrary and discriminatory conduct than for a union to intentionally decide in advance to ignore and to sacrifice the interests of those of its members who were also lessors of trucks, irrespective of the merits of whatever grievances might later arise. Yet this is what the Teamsters did in this instance. In Steele v. L & N R Co., 323 U.S. 192 (1944), 65 S.Ct. 226, 89 L.Ed. 173), Chief Justice Stone said:

> "(W)e think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights

> of the minority of the craft, without imposing on it any duty to protect the minority."

He added (lc 202):

> "We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates."

It is also an obvious truism that a union may as easily damage the interest of its members by inaction, as well as action. To systematically ignore a meritorious grievance by refusing to process it, has been repeatedly held to be a breach of fair representation.[19] As stated (Vaca v.

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19. Czosek v. O'Mara, 397 U.S. 25, 90 S. Ct. 770, 25 L.E.2d 21(1970); Vaca v. Sipes, 386 U.S. 171, 194, 87 S. Ct. 903, 17 L.Ed.2d. 842 (1967); Schum v. South Buffalo Ry Co (2nd Cir 1974), 496 F.2d 328; Retana v. Apartment, Motel etc Union (9th Cir 1972), 453 F.2d 1018; Griffin v. UAW (4th Cir 1972), 469 F.2d 181; Smith v. Pittsburgh Gage (3rd Cir 1972), 464 F.2d 870;

Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L. Ed. 2d 842 (1967):

> "a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion . . ."

So aloof and lackadaisical was the union here to the fate of the drivers (who were also lessors) that no one could recall a single grievance ever processed by this union for any lessor prior to our case. The union would do nothing for them, irrespective of the degree of outrage. Attempts by plaintiffs to visit with the union attorney were greeted with outbursts

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. (cont) see Republic Steel Corp v. Maddox, 379 US 650, 652, 85 S.Ct. 614, 13 L.Ed.2d. 580 (1965). In Elgin, Joliet & E.R.R. v. Burley, 325 U.S. 711 (1945), aff'd on rehearing, 327 U.S. 661 (1946) it was held that only the clearest of congressional purpose would justify the courts in allowing unions ". . . to submerge wholly the individual and minority interests. . not only in the forming of contracts which govern their employment relation, but also in giving effect to them and to all other incidents of that relation."

to "shut up" and not to bother him "because he was a busy man".[20]

Many courts and others feel that even the perfunctory handling of a grievance is sufficient in extreme cases to constitute a breach of the duty of fair representation.[21]

Never--the union stance here--is about as perfunctory as one can get!

A fortiori, hostility and invidious discrimination--the union attitude here--

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20. Tr 108.

21. deArroyo v. Sindicato de Trabajadores Packinghouse (1st Cir), 425 F.2d 281, cert den 400 U.S. 877; Griffin v. UAW (4th Cir 1972), 469 F.2d 181, 184; see Republic Steel Corp v. Maddox, 379 U.S. 650, 652, 85 S.Ct. 614, 13 L.Ed.2d. 580 (1965); 51 Tx LR 1037, 1097, 1100; 51 Tx LR 1119, 1200;

As stated by Douglas, J. (dissenting) in The Emporium Capwell Co. v. Western Addition Community Organization, U.S. , 95 S.Ct. 977, 43 L.Ed.2d. 12 (1975):

"The inertia of weak-kneed, docile union leadership can be as devastating to the cause of racial equality as aggressive subversion."

almost, by definition, constitute sufficient grounds to find a breach of fair representation.[22]

There can be little doubt that (Schum v. South Buffalo Railway Co. [2nd Cir 1974], 496 F.2d 328, 331):

> "As a general rule, grievances do not succeed without the full support of the union. Normally employees do not have the expertism, knowledge or experience to interpret the complicated substantive and procedural provisions of a collective bargaining agreement. In addition, specialized skill and insight are required at the higher levels of the

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22. Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964); Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967); Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d. 80 (1957); Cunningham v. Erie RR (2nd Cir 1966), 358 F.2d 640; Day v. UAW (6th Cir 1972), 466 F.2d 83; Griffin v. Int U. (4th Cir 1972), 469 F.2d 181; 51 Tx LR 1037, 1096 (1963); 118 Pa LR at 216; Seay v. McDonnell Douglas Corp (9th Cir 1970), 427 F.2d 996; Magallanes v. Laborers, Local 300, Cal Rptr ___, 75 Labor Cases 16,982 (1974), cert den ___(1975).

> grievance procedures to investigate and marshall the relevant facts and law, to prepare adequate petitions and briefs, to comply with the intricate limitations periods common to all labor contracts, and to present persuasive arguments to the board of arbitration."

Plaintiffs could only take step one of the six-step grievance procedure. They did. Many times, in fact. All other steps were within the exclusive control of management and/or the union. Both declined to lift a finger. In no way could this be regarded as fair representation.

WHERE PURSUIT OF THE GRIEVANCE PROCEDURES WOULD BE A FUTILITY, SUCH POINTLESS EXERCISE IS NOT REQUIRED

The Supreme Court of Oregon, in keeping with the rulings of this court and universal principles,[23] recognized that if further

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23. Glover v. St. Louis-S.F.R.R., 393 U.S. at 330-331, 89 S.Ct. at 552, 21 L.Ed.2d. 519; Steele v. Louisville & Nashville R.R., 323 U.S. 192, 206-7, 65 S.Ct. 226, 89 L.Ed. 173 (1944); Orphan v. Fernco (7th Cir 1972) 462 F.2d 794, 801; Schum v. South Buffalo Ry Co (2nd Cir 1974) 496 F.2d 328;

pursuit of grievances would be pointless, such nonsensical action would not be required. The futility of such procedure was amply demonstrated. Both union and management adamantly declared their complete unwillingness to reconsider grievances of lessor-drivers, regardless of merit.

Defendant suggests there is a conflict in the Circuits with respect to the circumstances when the futility doctrine can be utilized. Such conflict is more academic than real; and certainly as applied to the blatant facts here.

Defendant cites Fulsom v. United Buckingham Freightline, Inc. (W.D. Mo 1970) 324 F.Supp 135, for the asserted proposition that the court there confined the doctrine of futility to instances of racial discrimination. There is nothing to indicate that Judge Becker naively believed the long accepted futility exception was restricted to racial cases. Unmistakably the law is

to the contrary.[24] A comment in 73 Yale LJ 1215, 1233, notes:

> "The facts of Steele involved racial discrimination, but it is clear that the rationale of the decision is not restricted to discrimination based on race."[25]

Defendant's second and final gambit suggests that two other cases confined the futility doctrine to instances of union/employer collusion. Such distinction would be one of wooden logic only. The first case cited (Orphan v. Fernco Construction Corp [7th Cir 1972], 462 F.2d 794) reversed a verdict for the employer. The court held that where only the union could invoke the grievance procedure, the failure of individual members to allege an exhaustion of intra-union remedies was not fatal to

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24. 51 Tx LR 1037, 1098-9 (1973).

25. See Wellington, Union Democracy and Fair Representation; Federal Responsibility in a Federal System, 67 Yale LJ 1327, 1335 (1958).

their bringing of the action against the employer for damages for breach of the agreement.[26]

The last case cited is Lusk v. Eastern Products Corp. (4th Cir 1970), 427 F2d 705. Lusk was decided on an incidental pleading issue.

Nothing in either Fernco or Lusk supports defendant's contention the futility exception is limited to cases of collusion between management and the union.[27]

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26. The same Circuit did not circumscribe the futility exception to instances of management--labor collusion in Waters v. Wisconsin Steel Works (7th Cir 1970), 427 F2d 476. Judge Swygert stated (lc 490):
"(W)e can envision situations in which Union representatives repeatedly have breached their duty of fair representation in previous dealings with an employee. In such cases the employee could reasonably believe that attempts to seek the aid of the union in presenting a grievance would be utterly futile, thus justifying his failure to exhaust remedies."

27. A later case from the 4th Circuit (Griffin v. International U. [1972] 469 F2d 181, does not appear to be a case of union-management collusion either.

INDEPENDENT STATE BASIS FOR THE DECISION OF THE OREGON SUPREME COURT. DEFENDANT HAS WAIVED THE GRIEVANCE PROCEDURES SET FORTH IN THE COLLECTIVE BARGAINING AGREEMENT AND SHOULD BE ESTOPPED

There is more than adequate independent state basis to support the decision below, because defendant:

(a) ignored the collective bargaining agreement in many respects, as mentioned by the Oregon Supreme Court. For example, by refusing to insert the mandated language of the collective bargaining agreement into the lease, and refusing to file a copy of the lease with the union, both specific requirements;

(b) refused to comply with the arbitration provisions of the collective bargaining agreement by appointing any member to the joint grievance committee;

(c) announced it would not abide by any award which might be made by the arbitrators, unless that award favored defendant.

OTHER CASES CITED BY THE DEFENDANT DISTINGUISHED

Defendant cites:

(A) Emporium Capwell Co. v. Western Addition Community Organization, ___US___, 95 S Ct 977, 43 L Ed 2d 12 (1975).

In Emporium several employees attempted to circumvent their union by filing a complaint with the NLRB, during a time when the union was actively prosecuting their claims, and had indicated "it would process every such grievance through to arbitration if necessary." The union demanded the joint union-management Adjustment Board be convened "to hear the entire case." When the Adjustment Board meeting

convened, four of the employees (whose testimony the Union had intended to elicit) refused to participate in the grievance procedure and stalked out of the hearing. They also conducted their own private picketing and insisted on talking with Emporium's president. This court held that such employees could not bypass their exclusive bargaining representatives in this fashion.

In our case both union and management refused to do anything whatsoever. Finally plaintiffs filed a charge with the NLRB, but the latter ruled it had no jurisdiction either.

(B) Vaca v. Sipes, 386 US 171, 87 S Ct 903, 17 L Ed 2d 842 (1967).

Vaca held that the union had provided the employee with fair representation. The union had actively pushed plaintiff's claim through four successive grievance

steps. It then hired a doctor at union expense, to make an examination of plaintiff. That doctor confirmed that plaintiff, who had a long standing condition, did indeed have high blood pressure. At that point, the union decided to proceed no further. Though resolving the merits in favor of the union, this court recognized the state court did have jurisdiction of the case, as well as similar cases against the employer, and that such jurisdiction was not preempted by the NLRB. Justice White stated (l.c. 185):

> "We think that another situation when the employee may seek judicial enforcement of his contractual rights arises if, as is true here, the union has sole power under the contract to invoke the higher stages of the grievance procedure, and if, as is alleged here, the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance. ***Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of

bargaining agreements by wrongful union conduct in the enforcement of such agreements."

(C) Amalgamated Association of Street, Electric Railway and Motor Coach Employees v. Lockridge, 403 US 274, 91 S Ct 1909, 29 L Ed 2d 473 (1971)

Lockridge was suspended from the union and from his employment under the union security clause. He made some efforts, with the support of the secretary treasurer of the union local, to gain reinstatement in the Union. No charges were filed before the NLRB. Instead, he filed suit in the Idaho state court against the union.

In our case, plaintiffs received no union assistance. Plaintiffs did file charges with the NLRB, but the District Director refused to proceed because the NLRB lacked jurisdiction.

CONCLUSION

Defendant would have this court

accept a mindless and boundless extension of the preemption rule, which would bar an employee from suing his employer, even where the employer has:

> breached a lease which is entirely independent from the collective bargaining agreement; and even where all other possible avenues for redress have been fully exhausted.

Contracts between employees and their employer should be enforced in keeping with traditional principles. A fortiori, contracts between lessors and lessees should also be enforced according to their terms, even though the lessor is also an employee of the lessee. The ipse dixit of management and/or the unions is no substitute for the agreement which has been made.

Neither is it true that defendant will be subjected to enormous losses by this case. Plaintiffs seek merely the recovery

of those sums which have been illegally withheld from them by defendant. Their contract should be upheld.

Respectfully submitted,

Roger Tilbury

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Portland, Oregon 97205

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Attorneys for Respondents

May 20, 1975

APPENDIX B

IN THE CIRCUIT COURT FOR THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

ELDON GILSTRAP, WARREN P. BLAND, ROGER GILMORE, CLAUDIO MARTINEZ, RAYMOND MORRIS and C. P. ZACHOW,	)	
Plaintiffs,	)	No. 365-431
vs.	)	
	)	OPINION
MITCHELL BROS. TRUCK LINES, an Oregon corporation,	)	
Defendant.	)	

This case came into court as a class suit in which the plaintiffs in their own name and on behalf of others similarly situated sought certain relief from the defendant. This Court preliminarily determined that the plaintiffs' remedy was in law and not in equity, and that a class action was not permitted under the Oregon procedure. Thereafter the plaintiff Gilstrap amended his complaint to set forth several causes of action. It was agreed by all the parties that rather than file separate complaints for each of the remaining plaintiffs, their causes of action could be combined with Gilstrap's causes of action. In effect, each plaintiff has filed a separate complaint and all of the complaints have been consolidated for trial.

The plaintiffs are all lessor-drivers of truck equipment leased to the defendant. Each of the plaintiffs has signed a lease of his equipment similar to plaintiffs' Ex. 13. The plaintiffs were all members of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. The Locals to which the plaintiffs

belonged entered into a collective bargaining agreement with the Oregon Draymen and Warehousemen's Association. The defendant is a member of the Association and, therefore, all parties hereto are in effect parties to the agreement. (Ex. 22)

In their complaints the plaintiffs first seek damages for breach of the Equipment Lease as the same was amended by an oral agreement made in July, 1969. Apparently the drivers had been negotiating with the defendant for an increase in truck rental rates. A meeting was held with management and the drivers, and in the course of the meeting the company agreed that henceforth it would pay a bonus of 3/4¢ for each mile driven by a driver in a one-year period provided the driver did not have claims charged to him that aggregated more than $250 in the period.

Both the plaintiffs and the defendant agree that the bonus was to be paid annually, and that it was to be computed at the rate of 3/4¢ per mile. The disagreement between the plaintiffs and the defendant revolves around the meaning of the word "claims". The plaintiffs contend that the only claims that should be considered in arriving at the $250 figure were cargo damage claims. The defendant, on the other hand, contends that all claims, regardless of fault on the part of the owner-operator arising out of and paid in the course of the undertakings of the drivers, were to be considered when computing the total of chargeable claims. Such claims would include cargo, industrial accident and third party liability claims.

Many people testified in regard to this question. It is apparent that the plaintiffs' contention that only cargo claims

should be considered is too restrictive. The preponderance of the evidence supports the defendant's position.

Parties for both the plaintiffs and the defendant and their witnesses spoke of the 3/4¢ bonus as a "safety bonus", a bonus designed to encourage drivers to actively practice safety and thereby minimize claims. In my view safety involves more than mere absence of fault. It involves a conscious effort to avoid accidents and injuries.

I recognize that some apparently unfair results occur when the construction I have placed on this aspect of the agreement is adopted. One of the witnesses spoke of a claim that resulted when a youngster dropped something on his truck from a bridge under which the driver was driving. I appreciate that such seemingly unfair results will occur. However, these occurrences should be infrequent, and I would hope that the defendant would give some consideration in calculating "claims" to the fact that some claims clearly are unavoidable and bear no relation to safety practices.

In the second cause of action the plaintiffs seek payment of a bonus in the amount of 3 and 1/3¢ per mile driven by the plaintiffs while hauling "permit loads". At the meeting referred to above in July, 1969, payment of the permit load bonus was discussed. The drivers were suggesting a payment in the amount of 10¢ per mile. The defendant maintained that such a bonus should not exceed 3 and 1/3¢ per mile. The matter was, however, never resolved, i.e. no enforceable agreement was made, until a date not applicable to the periods involved in this law suit. I conclude, therefore, the plaintiffs must fail as to their second cause of action.

The third cause of action relates to Paragraph 4 of the Equipment Lease, which provides in part:

> "Lessee agrees to assume full responsibility for *** highway use taxes, mileage fees; tolls and State regulatory permits."

It is the position of the plaintiffs that the term "highway use taxes" includes taxes imposed by §4481 of the Internal Revenue Code entitled "Tax on Use of Certain Highway Motor Vehicles". I have considered the evidence offered by all parties and read the memoranda of the parties. It appears inescapable that the tax imposed by §4481 is in fact a highway use tax and it is includable within Paragraph 4 of the Equipment Lease. The defendant should reimburse plaintiffs for all federal highway use taxes deducted from plaintiffs' settlements during the applicable periods.

A more difficult question is raised by plaintiffs' fourth cause of action, which relates to federal fuel taxes which were charged against the plaintiffs by the defendant.

*Article XXXI of the Collective Bargaining Agreement provides in §10 in part as follows:

> "The Employer or certificated or permitted carrier hereby agrees to pay road or mile tax ***. All taxes or additional charges imposed by law relating to actual truck operation and use of highways no matter how computed or named, shall be paid by the carrier ***."

In my opinion this question is governed by

the case of Asbury Transportation Company v. Consolidated Freightways Corporation, 95 OAS, p. 1131. In that case the language contained in the Collective Bargaining Agreement was interpreted. The Court concluded that the wording in the Collective Bargaining Agreement imposed a duty upon the carrier to pay, among other taxes, the federal fuel taxes. Again, I have considered the briefs of counsel and I can conceive of no valid reason why this case should be distinguished from the case of Asbury, supra.

Defendant urges this case is distinguishable from Asbury for two reasons: (1) The equipment lease made no reference to the bargaining agreement as was the fact in Asbury; and (2) the lease construed in Asbury provided the carrier would "bear and pay" the taxes - in Ex. 13 the carrier's obligation was to "pay" the taxes. Defendant suggests it performed the lease when it in fact paid the fuel tax. However, as the lease did not require defendant to "bear" the tax, it was free to charge payment back against the plaintiffs.

The lease did not refer to the bargaining agreement. However, the bargaining agreement, which was binding upon both parties to this litigation, provided that all equipment leases such as Ex. 13 contain the following mandatory language:

> "*** To the extent that any provision of this lease may conflict with the provisions of the Oregon Draymen and Warehousemen's Association agreement as it applies to equipment driven by the owner, such provision of this lease shall be null and void and the provisions of such Agreement shall prevail." Ex. 22, Art. XXXI, §19.

I conclude the provisions of the bargaining agreement relating to payment of taxes is in conflict with the equipment lease. (Ex. 13). Simply stated, I find that §10, Art. XXXI, is to be considered a part of the equipment lease the same as if it were set forth in haec verba.

In my view if a contract provides that one party will "pay" a specified obligation which is a subject of the agreement, as between the parties and absent any language requiring the other party to reimburse the payor, the payor will "bear" as well as "pay" that obligation.

Several witnesses testified they were told when they entered into their equipment leases with the defendant that Mitchell Bros. Truck Lines would not be responsible for federal fuel taxes. The plaintiffs in this case, however, uniformly denied any such arrangement with Mitchell Bros. at the time their leases were made. In any event, the lease has to be read in light of its unambiguous wording and the unambiguous wording of the bargaining agreement without alteration or variance. If Mitchell Bros. intended to contract on the basis that it would not be responsible for federal fuel taxes, they could easily have said so in the lease agreement which they prepared. The plaintiffs should recover on their fourth cause of action.

I understand from the attorneys for the parties that the defendant will provide the data upon which the plaintiffs' damages can be computed. Mr. Tilbury will prepare judgments reflecting such calculations for each of the plaintiffs. This opinion can stand as findings and conclusions.

Dated this 31st day of July, 1973.

/s/ Clifford B. Olsen
CLIFFORD B. OLSEN

APPENDIX C

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
PORTLAND, OREGON 97204
248 3247

CLIFFORD B. OLSEN
JUDGE

August 9, 1973

Mr. Roger Tilbury
Attorney at Law
1123 S. W. Yamhill
Portland, Oregon 97205

Mr. Alex L. Parks
Attorney at Law
Jackson Tower
Portland, Oregon 97205

Re: Gilstrap et al. vs Mitchell Bros. Truck Lines
No. 365-431

Gentlemen:

Subsequent to the Opinion previously entered in this case I received a communication from the attorney for the defendant regarding the application of §3, Article VIII, of the Collective Bargaining Agreement to the controversy before the Court. On August 9, 1973, the parties through their attorneys appeared in court, and this problem was discussed.

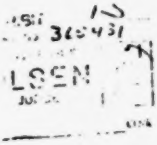
It is my opinion that this law suit involves a claimed breach of the equipment leases between the plaintiffs and the defendant. I do not think that §3, Article VIII, or the grievance procedures are made a part of the equipment lease by virtue of §19, Article XXXI. The plaintiffs, therefore, are entitled to judgment on their fourth causes of action for the period expressed in the pleadings and not necessarily limited to claims made within 90 days of a written demand by the plaintiffs or any of them.

Very truly yours,

Clifford B. Olsen
Circuit Judge

CBO:nt

APPENDIX D



MITCHELL BROS. TRUCK LINES
EQUIPMENT LEASE

Truck 1617 Trailer 1617 A

City Portland County Multnomah State Oregon Date 8/1/68

This is to certify that Mitchell Bros. Truck Lines, hereinafter called Lessee has received and rented from Raymond Morris hereinafter called Lessor, the following described truck and/or trailer:

TRACTOR OR TRUCK

Make Freightliner Year 1966 Type 3 ax Tras Model

Motor No. AF21732 State License No. State Oregon

Tire Sizes 10:00 x 22.

SEMI TRAILER OR TRAILER

Make Utility Year 1966 Model 2 ax Serial No. E13884

Type Flatbed State License No. State Oregon Tire Sizes 10:00 x 22

To be used by Lessee in transporting property in interstate and intrastate commerce between points which Lessee is lawfully authorized to serve.

It is mutually agreed and understood between Lessor and Lessee that:

1. Lessee shall maintain at all times during the period of this lease complete and exclusive jurisdiction, control, operation and possession of said described vehicle or vehicles, and drivers.

2. Lessor warrants that the equipment leased hereunder is in good repair and good, safe, roadworthy condition.

3. Lessee agrees to operate said equipment at all times in compliance with all laws and regulations of any Federal or State agency affecting the operation of such vehicles.

4. Lessee agrees to assume full responsibility for the equipment leased while the same is in Lessee's possession, said responsibility to include public liability, property damage, and cargo insurance, highway use taxes, mileage fees, tolls and State regulatory permits.

5. Lessee shall pay to Lessor for the use of said equipment during the period of the lease the sum of .31¢ cents per running mile, to include maintenance and depreciation.

6. Lessor understands and agrees that the above payment per mile by Lessee is payment in full for the lease of said equipment with driver.

7. Lessee shall not be liable for any damage caused to Lessor's equipment leased hereunder by fire, theft, collision or any other cause, unless on Lessee's permanent schedule.

8. Lessor agrees to carry a Collect policy, for liability and property damage to cover equipment for movement of vehicle when not under orders and control of Lessee.

9. Lessor shall maintain said equipment in good condition at his own cost during the period of this lease and further agrees that any expense necessary to properly license said equipment for the service contemplated herein shall be borne by Lessor and if said maintenance expense or licensing expense is paid by Lessee, the same may be deducted from the amount payable hereunder.

10. The driver of said equipment shall be placed on Lessee's payroll and paid in the same manner as other drivers in Lessee's employ, provided however, the driver's gross salary shall be deducted from the rental to be paid Lessor pursuant to Paragraph 5 above.

11. The term of this lease shall be for a period of not less than thirty (30) days beginning the 1st day of August, 1968 and ending the 1st day of November, 1968.

Executed the day and year first above written. Note: This lease may be extended or cancelled by mutual agreement of both parties.

MITCHELL BROS. TRUCK LINES
2300 N. W. 30th Avenue
Portland, Oregon 97210

By _____
Lessee

Raymond Morris
945 Lozier Lane
Medford, Oregon 97501

By Raymond S. Morris

APPENDIX B

ARTICLE VII

Joint Labor-Management Committee

Section 1.

Make-up of Committee

The Employer and the Union shall forthwith establish a permanent Joint Labor-Management Committee, herein referred to as Joint Committee. This Committee shall consist of three (3) members and six (6) alternates appointed by the Employers, three (3) members and six (6) alternates appointed by the Union. The selection, removal and replacement, of a chairman, shall be determined by the Committee members appointed by the Union and members appointed by the Employer. The chairmanship shall alternate between Employer and Union each six (6) months during the life of this agreement. The chairman shall have full voting powers. The Joint Committee shall formulate such rules of procedure to govern the conduct of its proceedings.

Section 2.

Function.

It shall be the function of the Joint Committee to settle disputes in accordance with the procedure set out in Article VIII.

Section 3.

Attendance.

Meetings of the Joint Committee to settle disputes in accordance with the procedure set out in Article VIII.

Section 4.

Procedure.

When a dispute arises involving the computation of compensation of any employee, such dispute shall be reduced to writing, giving the pay period of the alleged error and any other pertinent information needed, and presented to the Employer. Thereupon the authorized business representatives of the Union, and the Joint Committee shall have the right at the respective steps of the disputes procedure set out in Article VIII to examine time sheets and pay records of the affected employee.

Section 5.

Non-Members.

Articles VII and VIII do not apply to employers who are not members of the Oregon Draymen and Warehousemen's Association.

ARTICLE VIII

Disputes Procedure

Section 1.

Disputes.

All questions, disputes and controversies arising under this agreement or any supplement hereto, or between the parties as to employer-employee relations covered by this agreement, shall be adjusted and settled in the manner provided in this Article, unless otherwise expressly provided in this agreement. A copy of all decisions shall be issued to each Local Union and each member of the Oregon Draymen Association of the settlement of the dispute. The procedure for such adjustment and settlement shall be as follows:

Step 1. Any grievance of an employee shall first be taken up between such employee and his immediate supervisor.

Failing notification by an employee, the Representatives of the Union may file grievances alleging violation of the agreement.

Step 2. Failing settlement under Step 1, such grievance shall be taken up between a representative of the Local Union and the Employer.

Step 3. Failing settlement under Step 2, such grievance, and any question, dispute or controversy that is not of the kind that is subject to Steps 1 and 2, shall be reduced to writing and be referred to and taken up between the Secretary or other authorized representatives of the Local Union and the authorized bargaining representative of the Employer.

Step 4. Failing settlement under Step 3, the dispute shall be referred for settlement or decision to the Joint Committee. If the Joint Committee, by a majority vote, settles or decides the dispute, such decision shall be final and binding on both parties, and no appeal may be taken to an Arbiter, except as provided in Section 4 of this Article.

Step 5. If the Joint Committee is unable to settle or decide the dispute, it shall, at the request of the Union or the Employer involved be appealed to a seventh impartial representative who shall be the Arbiter. The decision of the Arbiter shall be final and binding on both parties.

Step 6. In the event a grievance or dispute is deadlocked at Step 5, the grievance or dispute shall be submitted to arbitration and the Arbitration Board shall be selected according to and shall be governed by the following procedure:

(a) The Board of Arbitration shall consist of three (3) members selected by the Union and three (3) members selected by the Association. In the event that these six (6) members of the Board of Arbitration fail to agree upon the disposition of a dispute or grievance within three (3) working days after the meeting for this purpose, then, at the request of either of these six (6) members of the Board of Arbitration, the Federal Mediation and Conciliation Service shall be requested to name a panel of seven (7) arbitrators, from which the six (6) arbitrators shall select the seventh and impartial arbitrator in the following manner:

(b) The six (6) arbitrators shall determine by lot the order of elimination, and thereafter each side shall in that order alternately eliminate one (1) name until only one (1) remains. The seventh (7th) or remaining person named shall thereupon be accepted by the six arbitrators as the seventh impartial arbitrator.

(c) The seven (7) arbitrators shall thereupon constitute the Board of Arbitration to decide the issue or issues involved. The award of the Board of Arbitration must be rendered within fifteen (15) days after the matter is finally submitted to the Board and shall be binding upon the parties and shall be complied with within five (5) working days after the decision is rendered.

(d) The Board of Arbitration shall not have the power or authority to add to, subtract from, or modify the terms of this agreement.

(e) Expenses and compensation of the seventh arbitrator shall be divided equally between the Employer and the Union

Section 2.

Time Limitations.

Except as otherwise specifically provided in this agreement, all grievances and disputes shall be submitted to the Joint Committee within thirty (30) days of the date of the occurrence of the matter upon which the grievance or dispute is based. Any such grievance or dispute not submitted within such time shall be waived unless the Joint Committee by majority vote for good cause accepts such submission or unless the Employer has intentionally concealed the facts upon which the grievance or dispute is based.

Section 3.

Money Disputes.

Any dispute as to the amount of money due any employee under this agreement or any supplement hereto shall be submitted in writing to the Employer or his authorized bargaining representative for investigation and adjustment. Any such dispute not submitted within ninety (90) days of the pay day on which any such amount of money is claimed to have become due shall be deemed waived unless the Employer intentionally conceals the facts from which such dispute arises. This ninety (90) day limitation shall not be applicable if it is in conflict with State or Federal law. If such dispute shall not have been adjusted or settled to the satisfaction of parties concerned within five (5) days, exclusive of Saturdays, Sundays and holidays, after the submission of the complaint to the Employer or his authorized bargaining representative, the Union shall have the right to take such legal or economic action against the Employer as it may deem proper, unless the Employer on the sixth day shall post with the representative designated by the Joint Committee the amount claimed, or unless the Employer is covered as of the date of the claim by a bond of a kind and in an amount designated by the Joint Committee. If the Employer does not submit the dispute to the Joint Committee within ten (10) days, exclusive of Saturdays, Sundays and holidays, after submission of said complaint, the amount so claimed shall be paid. If the Employer does so submit the dispute to the Joint Committee, said dispute shall be determined according to the disputes procedure set out in this Article VIII of this agreement. If, in the consideration of any claim submitted under this section, it shall appear that any grievance or dispute is involved in connection therewith, other than a claim for money due, such grievance or dispute shall be considered and determined in the same manner as if it had been submitted in accordance with Section 1 of this Article.

Section 4.

Interpretation of Agreement.

All matters pertaining to the interpretation of any provision of this agreement or any supplement hereto may, at the request of any party, be referred for decision to the Joint Committee, such request to be in writing. Nothing contained in this section shall affect the rights of

ARTICLE XXXI

Owner-Operators

Section 1.

Coverage.

Owner-operators (See Note), other than certificated or permitted carriers shall not be covered by this Agreement unless affiliated by lease with a certificated or permitted carrier which is required to operate in full compliance with all provisions of this Agreement and holding proper ICC and State certificates and permits. Such owner-operators shall operate exclusively in such service and for no other interest.

NOTE: Whenever "owner-operator is used in this Article, it means owner-driver only, and nothing in this Article shall apply to any equipment leased except where owner is also employed as a driver.

Section 2.

Compensation and Seniority.

This type of operator's compensation for wages and working conditions shall be in full accordance with all the provisions of this Agreement and applicable agreements supplemental thereto. The owner-operator shall have seniority as a driver only.

Section 3.

Certificate and Title.

Certificate and title to the equipment must be in the name of the actual owner.

Section 4.

Management Rights.

In all cases, hired or leased equipment shall be operated by an employee of the

certificated or permitted carrier. The Employer expressly reserves the right to control the manner, means and details of, and by which, the owner-operator performs his services, as well as the ends to be accomplished.

Section 5.

Rotating Board.

Certificated or permitted carriers shall use their own available equipment, together with all leased equipment under minimum thirty (30) day bona fide lease arrangements, on a rotating board, before hiring any extra equipment.

Section 6.

Payment of Compensation.

Separate checks shall be issued by the certificated or permitted carriers for drivers' wages and equipment rental. At no time shall the equipment check be for less than actual miles operated. Separate checks for drivers shall not be deducted from the minimum truck rental revenue. The driver shall turn in time direct to the certificated or permitted carrier. All monies due the owner-operator may be held no longer than two (2) weeks, except where the lease of equipment agreement is terminated and in such case all monies due the operator may be held no longer than thirty (30) days from the date of the termination of the operation of the equipment.

Section 7.

Method of Payment.

Payment for equipment service shall be handled by the issuance of a check

for the full mileage operated, tonnage or percentage, less any agreed advances. A statement of any charges by the certificated or permitted carrier shall be issued at the same time, but shall not be deducted in advance.

Section 8.

Supplies to Be Purchased.

The owner-operator shall have complete freedom to purchase gasoline, oil, grease, tires, tubes, etc., including repair work, at any place where efficient service and satisfactory products can be obtained at the most favorable prices.

Section 9.

No Deduction.

There shall be no deduction pertaining to equipment operation for any reason whatsoever.

Section 10.

Expenses to Be Paid by Employer.

The Employer or certificated or permitted carrier hereby agrees to pay road or mile tax, social security tax, compensation insurance, public liability and property damage insurance, bridge toll, fees for certificates, permits and travel orders, fines and penalties for inadequate certificates, license fees, weight tax and wheel tax, and for loss of driving time due to waiting at State lines, and also cargo insurance. It is expressly understood that the owner-driver shall pay the license fees in the State in which title is registered.

All tolls, no matter how computed, must be paid by the Employer regardless of any agreement to the contrary.

All taxes or additional charges imposed by law relating to actual truck operation and use of highways, no matter how computed or named, shall be paid by the carrier, excepting only vehicle licensing as such, in the State where title is registered.

Section 11.

Money Advanced.

There shall be no interest or handling charge on earned money advanced prior to the regular pay day.

Section 12.

Filing of Lease Agreements.

All certificated or permitted carriers hiring or leasing equipment owned and driven by the owner-driver shall file a true copy of the lease agreement covering the owner-driver equipment with the Oregon Draymen and Warehousemen's Association and the Local Union involved. The terms of the lease shall cover only the equipment owned and driven by the owner-driver.

Section 13.

No Reduction.

There shall be no reductions where the present basis of payment is higher than the minimums established herein for this type of operation. Where owner-operator is paid on a percentage or tonnage basis and the operating company reduces its tariff, the percentage or tonnage basis of payment shall be automatically ad-

justed so that the owner-operator suffers no reduction in equipment rental or wages, or both.

Section 14.

Other Agreements Dissolved.

It is further understood and agreed that any arrangements which have heretofore been entered into between members of the Union, either among themselves or with the Employer or with the aid of the Employer, applicable to owner-driver equipment contrary to the terms hereof, shall be dissolved or modified within thirty (30) days after the signing of this Agreement so that such arrangements shall apply only to equipment of the owner-driver while being driven by such owner driver. In the event that the parties cannot agree on a method of dissolution or modification of such arrangements to make the same conform to this Agreement, the question of dissolution or modification shall be submitted to arbitration, each party to select one (1) member of the arbitration board, and the two (2) so selected to choose a third (3rd) member of said Board. If the two (2) cannot agree upon the third (3rd) within five (5) days, he shall be appointed by the Joint Committee. The decision of said board to be final and binding.

Section 15.

Fleet Lease Arrangements.

It is further agreed that the intent of this clause and this entire Agreement is to assure the payment of the Union scale of wages as provided in this Agreement and to prohibit the making and carrying out of any plan, scheme or device to circumvent or defeat the pay-

ment of wage scale provided in this Agreement. This clause is intended to prevent the continuation of or formation of combinations or corporations or so-called lease or fleet arrangements whereby the driver is required to and does periodically pay losses sustained by the corporation or fleet arrangement, or is required to accept less than the actual cost of running of his equipment, thus, in fact, reducing his scale of pay.

Section 16.

Sale at Fair Value.

It is further agreed that if the Employer or certificated or permitted carrier requires that the "driver-owner-operator" sell his equipment to the Employer or certificated or permitted carrier, directly or indirectly, the "driver-owner-operator" shall be paid the fair true value of such equipment. Copies of the instruments of sale shall be filed with the Union and unless objected to within ten (10) days shall be deemed satisfactory. If any question is raised by the Union as to such value, the same shall be submitted to arbitration, as set forth above, for determination. The decision of the arbitration board shall be final and binding.

Section 17.

Lease Cancellation.

It is further agreed that the Employer or certificated or permitted carrier will not devise or put into operation any scheme whether herein enumerated or not, to defeat the terms of the Agreement, wherein the provisions as to compensation for services on and for use of equipment owned by owner-driver shall

be lessened, nor shall any owner-driver lease be cancelled for the purpose of depriving Union employees of employment, and any such complaint that should arise pertaining to such cancellation of lease or violation under this Section shall be subject to the Grievance Procedure of the agreement.

Section 18.

Handling Grievances.

(a) The use of individual owner-operators shall be permitted by all certificated or permitted carriers who will agree to submit all grievances pertaining to owner-operators to joint committee in this area. It is understood and agreed that all such grievances will be promptly heard and decided with the specific purpose in mind of:

1. Protecting provisions of the Union contract;

2. prohibiting any and all violations directly or indirectly of contract provisions relating to the proper use of individual owners;

3. prohibiting any attempts by any certificated or permitted carrier in changing his operation which will affect the rights of drivers under the terms of the contract, and generally the certificated or permitted carriers agree to assume responsibility in policing and doing everything within their power to eliminate all alleged abuses in the use of owner-drivers which resulted in the insertion of this Section 18;

4. the certificated or permitted carriers agree that they will, with a joint meeting of the Unions, set up uniform

rules and practices under which all cases will be heard;

5. no owner-operator shall be permitted to drive or hold seniority where he owns three or more pieces of leased equipment. This provision shall not apply to present owner-operators having three or more pieces of equipment under lease agreement, but such owner-operators shall not be permitted to put additional equipment in service so long as he engaged in work covered by this Agreement or holds seniority. Where such owner-operator drives, he can hold seniority where he works sixty percent (60%) or more of time.

Section 19.

Mandatory Language for Agreements.

All leases, agreements, or arrangements between carriers and owner-operators shall contain the following statement:

"The equipment which is the subject of this lease shall be driven by an employee of the lessee at all times that it is in the service of the lessee. If the lessor is hired as an employee to drive such equipment he shall receive as rental compensation for the use of such equipment no less than the minimum rental rates, allowances and conditions (or the equivalent thereof as stated in the lease, and, in addition thereto, the full wage rate and supplementary allowances for drivers) or the equivalent thereof as approved by the Oregon Draymen and Warehousemen's Association.

"The lessee expressly reserves the right to control the manner, means and de-

tails of, and by which the driver of such leased equipment performs his services, as well as the ends to be accomplished. To the extent that any provision of this lease may conflict with the provisions of the Oregon Draymen and Warehousemen's Association agreement as it applies to equipment driven by the owner, such provision of this lease shall be null and void and the provisions of such Agreement shall prevail."

ARTICLE XXXII

Stewards

The Employer recognizes the right of the Union to designate job stewards and alternates from the Employer's seniority list. The authority of job stewards and alternates so designated by the Union shall be limited to, and shall not exceed, the following duties and activities:

1. The investigation and presentation of grievances with his Employer or the designated company representative in accordance with the provisions of the collective bargaining agreement;

2. The collection of dues when authorized by appropriate Local Union action;

3. The transmission of such messages and information, which shall originate with, and are authorized by the Local Union or its officers, provided such messages and information—

(a) have been reduced to writing, or

(b) if not reduced to writing, are of a routine nature and do not involve work stoppages, slow downs, refusal to handle goods, or any other interference with the Employer's business.

Job Stewards and alternates have no authority to take strike action, or any other action interrupting the Employer's business, except as authorized by official action of the Union. The Employer recognizes these limitations upon the authority of job stewards and their alternates, and shall not hold the Union liable for any unauthorized acts. The Employer in so recognizing such limitations shall have the authority to impose proper discipline, including discharge, in the event the shop steward has taken unauthorized strike action, slow down or work stoppage in violation of this Agreement.

Stewards shall be permitted reasonable time to investigate, present and process grievances on the Company property, without loss of time or pay during his regular working hours. Such time spent in handling grievances shall be considered working hours in computing daily and or weekly overtime if within the regular work schedule of the steward.

When the Union designates a Job Steward at an individual warehouse of an employer who has more than one warehouse, the Job Steward shall be assigned to the same warehouse in which he was designated as a steward unless it is necessary for the Job Steward to exercise his seniority to retain his employment.

ARTICLE XXXIII

Funeral Leave

In the event of a death in the family (father, mother, wife, husband, brother, sister, son or daughter), an employee with seniority shall be entitled to be paid for the day prior to and the day of the